TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 268.

GEORGE H. MIFFLIN, JAMES MURRAY KAY, HENRY O. HOUGHTON, INDIVIDUALLY AND AS TRUSTEE WITH ALBERTA M. HOUGHTON UNDER THE WILL OF HENRY O. HOUGHTON, DECEASED, ET AL., &c., APPELLANTS,

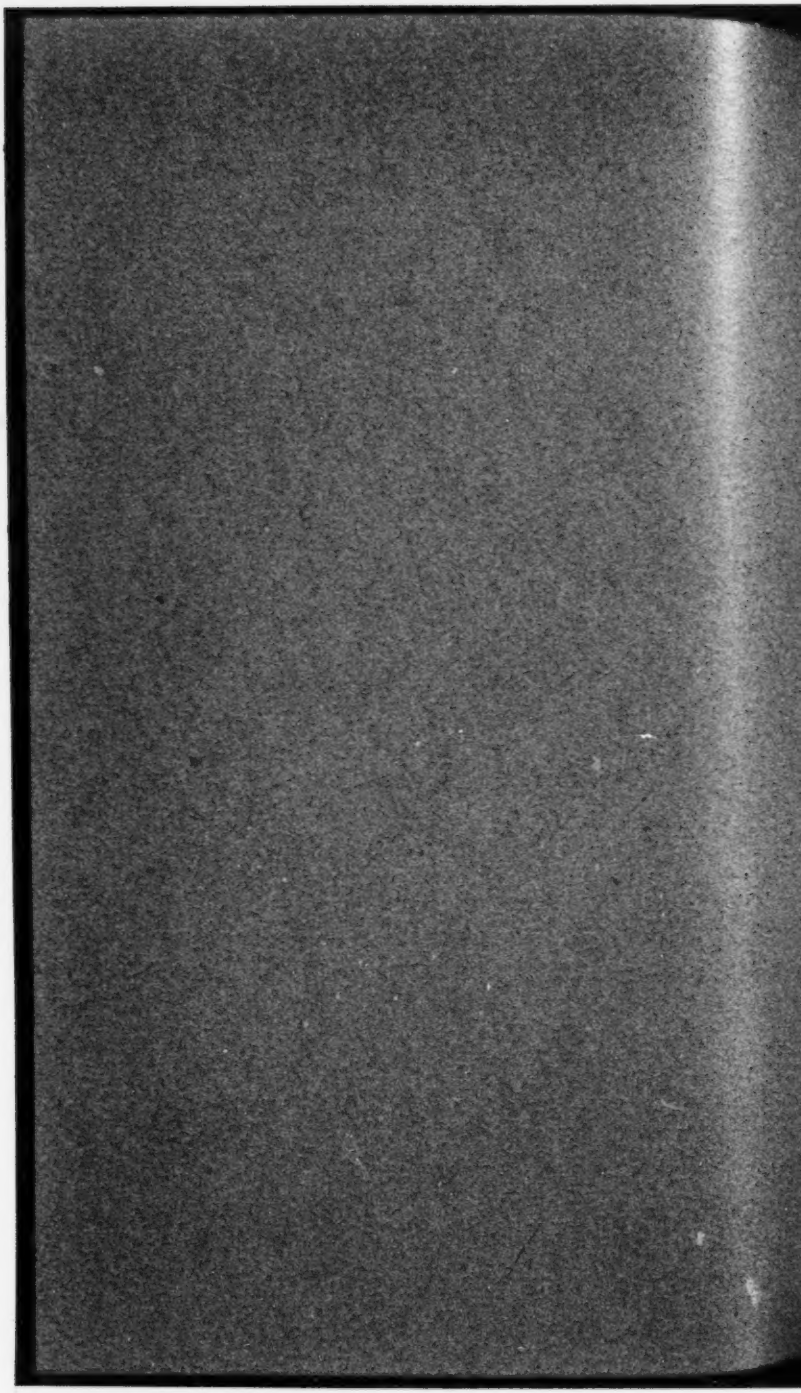
vs.

THE R. H. WHITE COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FILED MARCH 7, 1902.

(18,442.)



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a United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

GEORGE H. MIFFLIN ET AL., Complainants, Appellants,
v.
R. H. WHITE COMPANY, Defendant, Appellee. } No. 388.

Appeal from the circuit court of the United States for the district of Massachusetts from final decree (Colt, J.), March 29, 1901.

Transcript of record upon the appeal of George H. Mifflin *et al.*, complainants, appellants, in the above-entitled cause, to the Supreme Court of the United States.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

GEORGE H. MIFFLIN ET AL., Complainants, Appellants,
v.
R. H. WHITE COMPANY, Defendant, Appellee. } No. 388.

Transcript of Record of Circuit Court.

(Filed in circuit court of appeals May 31, 1901.)

UNITED STATES OF AMERICA,
District of Massachusetts, } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of October, in the year of our Lord one thousand nine hundred.

Before the Honorable Le Baron B. Colt, circuit judge.

GEORGE H. MIFFLIN ET AL., Complainants,
v.
R. H. WHITE COMPANY, Defendant. } No. 1232. Equity.

The original bill of complaint in this cause was filed in the clerk's office on the seventh day of December, A. D. 1899, and was duly entered at the October term of this court, A. D. 1899.

2 On the thirteenth day of March, A. D. 1900, an amended bill of complaint was filed and allowed by consent and is in the words and figures following :—

3 Circuit Court of the United States, District of Massachusetts.
In Equity.

GEORGE H. MIFFLIN ET AL.
v.
R. H. WHITE COMPANY. } No. 1232.

Amended Bill of Complaint.

(Filed and allowed by consent March 13, 1900.)

To the honorable the judges of the circuit court of the United States in and for the district of Massachusetts, sitting in equity:

George H. Mifflin, of Boston, James Murray Kay, of Brookline, Henry O. Houghton, individually and as trustee with Alberta M. Houghton, both of Cambridge, under the will of Henry O. Houghton, deceased, all within the district of this court, and Lucy H. Valentine, Oscar R. Houghton and Albert F. Houghton, all of New York in the State of New York, and all citizens of the United States, copartners under the firm name of Houghton, Mifflin & Company, and having a usual place of business in said Boston, bring this, their amended bill of complaint, against the R. H. White Company, a corporation duly established according to law, and having its usual place of business in Boston within said district.

And your orators show unto your honors, upon information and belief, that Oliver Wendell Holmes, late of said Boston, was at all the times hereinafter mentioned until his death, which occurred on the seventh day of October, 1894, a citizen of the United States, and was the author of a certain literary work entitled "The Professor at the Breakfast Table," and that during the year 1858 the firm of Phillips, Sampson & Company was engaged in the publish-
4 ing business in the city of Boston and State of Massachusetts, and was the proprietor and publisher of a certain periodical magazine published each month at the said city of Boston and entitled and known as the "Atlantic Monthly," and having a large circulation; and that thereafter said firm continued to be the proprietor and publisher of said magazine until the sale and assignment thereof to the firm of Ticknor & Fields in the fall of the year 1859, as hereinafter stated.

And your orators further say that said literary work entitled "The Professor at the Breakfast Table" consisted of twelve component parts, and that ten of said parts of said work were published in print, under the title "The Professor at the Breakfast Table," in and as a part of ten numbers of the said "Atlantic Monthly," to wit, those for January, 1859, and each successive month thereafter, down to and including the month of October, 1859, by the said firm of Phillips, Sampson & Company, at the said city of Boston, prior to the twenty-eighth day of September, 1859; and that the two other parts of said work, the same with said ten parts constituting the whole of said work, were published in print, under the title "The Professor at the Breakfast Table," in and as a part of the numbers

of the said "Atlantic Monthly," for the months of November, 1859, and December, 1859, by the said firm of Ticknor & Fields at the said city of Boston prior to Nov. 23, 1859.

And your orators further say that each of said twelve numbers of the "Atlantic Monthly" was a volume bound in a paper cover of about one hundred and twenty-eight printed pages, and consisted of the part of the said work entitled "The Professor at the Breakfast Table," therein published as aforesaid, and other literary compositions.

And your orators further say, upon information and belief, that prior to the twenty-eighth day of September, 1859, said firm of Phillips, Sampson & Company did, at said city of Boston, publish in print said ten numbers of the "Atlantic Monthly" for January, 1859, and each successive month thereafter, down to and including the month of October, 1859, and did, prior to Sept. 28, 1859, sell to the public, at said city of Boston, thousands of printed copies of each of said numbers of the "Atlantic Monthly."

And your orators further say, upon information and belief, that prior to the twenty-third day of November, 1859, the said firm of Ticknor & Fields did, at the said city of Boston, publish in print said numbers of the "Atlantic Monthly" for the months of November, 1859, and December, 1859, and did, prior to Dec. 10, 1859, sell to the public, at said city of Boston, thousands of printed copies of each of said two numbers of the "Atlantic Monthly."

And your orators further say, upon information and belief, that said ten parts of said work entitled "The Professor at the Breakfast Table," which were printed, published and sold as aforesaid by said firm of Phillips, Sampson & Company in said ten numbers of the "Atlantic Monthly" for January, 1859, and each successive month thereafter, down to and including the month of October, 1859, were so printed, published and sold by Phillips, Sampson & Company by and with the consent and authority of said Oliver Wendell Holmes, and under and in accordance with an agreement made by and between said Oliver Wendell Holmes and said firm of Phillips, Sampson & Company, whereby, for a valuable consideration, the said Oliver Wendell Holmes granted to said firm of Phillips, Sampson & Company the right and privilege to print, publish and sell said twelve parts of said work entitled "The Professor at the Breakfast Table" in the twelve numbers of the "Atlantic Monthly" for the month of January, 1859, and each successive month thereafter, down to and including the month of December, 1859.

And your orators further say, upon information and belief, that after the publication as aforesaid of the number of the "Atlantic Monthly" for October, 1859, and prior to the publication as aforesaid of the number of the "Atlantic Monthly" for the month of November, 1859, the duly appointed assignees in insolvency of said firm of Phillips, Sampson & Company, said firm having failed in business, sold and assigned all the interest of Phillips, Sampson & Company in the said "Atlantic Monthly" and in their said agreement with Oliver Wendell Holmes to the firm of Ticknor & Fields, who were at that time engaged in the publishing business

in the city of Boston; and that said Oliver Wendell Holmes knew of and assented to said sale and assignment to said Ticknor & Fields of the "Atlantic Monthly," and of the right of Phillips, Sampson & Company to publish "The Professor at the Breakfast Table" therein; and that said firm of Ticknor & Fields for several years immediately subsequent to said sale and assignment was the proprietor and
6 publisher of said "Atlantic Monthly" and published the same in said city of Boston.

And your orators further say, on information and belief, that said two parts of said work entitled "The Professor at the Breakfast Table," which were printed, published and sold as aforesaid by said firm of Ticknor & Fields in said two numbers of the "Atlantic Monthly" for the months of November, 1859, and December, 1859, were so printed, published and sold by said firm of Ticknor & Fields by and with the consent and authority of said Oliver Wendell Holmes, and under and in accordance with the said agreement between Oliver Wendell Holmes and Phillips, Sampson & Company, theretofore assigned to said Ticknor & Fields as aforesaid.

And your orators further say, upon information and belief, that for the purpose of securing a copyright in said number of the "Atlantic Monthly" for the month of December, 1859, said firm of Ticknor & Fields did, on the seventeenth day of November, 1859, and prior to the publication of said number of the "Atlantic Monthly" for December, 1859, deposit in the name of Ticknor & Fields a printed copy of the title of said number of the "Atlantic Monthly" for December, 1859, to wit, "Number 26 the Atlantic Monthly, devoted to literature, art and politics, December, 1859," in the clerk's office of the district court of Massachusetts, being the district in which said Oliver Wendell Holmes, as also the partners in said firm of Ticknor & Fields, at the time resided; and that the clerk of said court did record the said title in the words of the statute then in the premises obtaining; and the said Ticknor & Fields did also, on the said seventeenth day of November, 1859, cause to be delivered to the said clerk of said district court a copy of the number of the "Atlantic Monthly" for December, 1859.

And your orators further say, on information and belief, that the said publishing house of Ticknor & Fields inserted in the several copies of every edition published of the entire number of the "Atlantic Monthly" for December, 1859, on the page immediately following the title page, the following words: "Entered according to act of Congress in the year 1859, by Ticknor & Fields, in the clerk's office of the district court of the district of Massa-
7 chusetts;" but no notice of copyright was given in any copy of any edition of "The Professor at the Breakfast Table," published in separate book form, except as hereinafter stated.

And your orators further say, upon information and belief, that after the publication as aforesaid of all the parts of said work entitled "The Professor at the Breakfast Table," in the said numbers of the "Atlantic Monthly," and on the twenty-first day of December, 1859, the said Oliver Wendell Holmes did, by Ticknor & Fields as his agents, deposit a printed copy of the title of said work entitled "The

Professor at the Breakfast Table" in the clerk's office of the district court for the district of Massachusetts, that being the district wherein said author then resided; and that the clerk of said court forthwith recorded said title, to wit, "The Professor at the Breakfast Table," in a book kept for that purpose; and the said Oliver Wendell Holmes did also, on the twenty-first day of December, 1859, cause a copy of said work, in separate book form, entitled "The Professor at the Breakfast Table," to be to the said clerk delivered.

And your orators further show, upon information and belief, that on the twenty-second day of December, 1859, said firm of Ticknor & Fields published in print the whole of said work entitled "The Professor at the Breakfast Table," at the said city of Boston, in separate book form, that is to say, not as a part of the "Atlantic Monthly," or of any number or numbers thereof, but as a separate and distinct volume, containing no other literary matter and bearing the title "The Professor at the Breakfast Table," and no other title; and that during many years immediately subsequent to Dec. 22, 1859, said firm of Ticknor & Fields did publish in print many editions of the whole of said work entitled "The Professor at the Breakfast Table" in said separate book form in said city of Boston, and that said firm of Ticknor & Fields so published said work in separate book form with the license and consent of said Oliver Wendell Holmes, and under and in accordance with an agreement theretofore made by and between said Oliver Wendell Holmes and said Ticknor & Fields, whereby, for a valuable consideration, said Oliver Wendell Holmes agreed to grant to said firm of Ticknor & Fields a right to so publish said work in separate book form as aforesaid.

8 And your orators further say, upon information and belief, that said Oliver Wendell Holmes and said firm of Tickner & Fields inserted in the several copies of every edition of said work entitled "The Professor at the Breakfast Table," published in separate book form as aforesaid, on the page immediately following the title page, the following words, to wit: "Entered according to act of Congress in the year 1859, by Oliver Wendell Holmes, in the clerk's office of the district court of the district of Massachusetts;" except that in additions published after June, 1874, the notice was as follows, to wit: "Copyright 1859 by Oliver Wendell Holmes." No other notice of copyright was given in any copy of any edition of said work entitled "The Professor at the Breakfast Table," published in separate book form as aforesaid, at any time prior to June 30, 1887, nor in any copy of any addition of said work published by said Oliver Wendell Holmes, or by said Ticknor & Fields, or by any other person, between Dec. 21, 1859, and June 30, 1887.

And your orators further say that on the thirtieth day of June, 1887, said Oliver Wendell Holmes recorded the title of "The Professor at the Breakfast Table" a second time, and deposited in the mail, addressed to the Librarian of Congress, at Washington, D. C., a printed copy of the title of said book, and the said librarian did forthwith record the title of said book, to wit: "The Professor at the Breakfast Table," in a book kept for that purpose; and that said Oliver Wendell Holmes did also cause a copy of the record last

aforesaid to be published in the *Publishers' Weekly*, a weekly newspaper published in the city of New York, in the issues of said paper for July 23, Aug. 6, Aug. 13 and Aug. 20, 1887, and did also, on Aug. 6, 1887, deposit two copies of said work entitled "The Professor at the Breakfast Table" with the Librarian of Congress; and said Oliver Wendell Holmes caused to be inserted in the several copies of each and every edition thereafter published of said work entitled "The Professor at the Breakfast Table," on the page immediately following the title page, a notice as follows: "Copyright 1887 by Oliver Wendell Holmes," and also the following words, to wit: "Copyright 1859 by Oliver Wendell Holmes."

And your orators further say that on the twenty-first day of February, 1895, Oliver Wendell Holmes, Jr., the sole executor of
9 the will of the said Oliver Wendell Holmes, the author, executed and delivered to your orators an assignment in writing, under his hand and seal, of which a copy is hereto annexed and marked "Exhibit A" hereof.

And your orators further say, that since the first day of October, 1899, without the consent and against the will of your orators, the defendant has sold, and continues to sell, copies of the whole of the aforesaid work entitled "The Professor at the Breakfast Table," all of which copies were copied by the defendant from said twelve numbers of the "Atlantic Monthly," and were exact copies, word for word, of said twelve parts of "The Professor at the Breakfast Table," which were printed and published in the aforesaid numbers of the "Atlantic Monthly," and none of said copies contained any other or additional matter whatsoever; and that upon each and every copy of said book so sold or disposed of by the defendant, a notice appeared on the title page stating that the same was "reprinted from the original text as published in the Atlantic Monthly."

In consideration whereof, and because your orators cannot have adequate relief except in a court of equity, and to the end that the said R. H. White Company may answer all and singular the matters and things hereinbefore set forth and complained of, and that the said R. H. White Company be restrained by injunction, as well perpetually as during the pendency of this suit, from selling, and from exposing for sale copies of the said piratical and unlawful book; and that said R. H. White Company may be required to account to your orators for all such books so sold by it, and to pay over to your orators the profits which it has made, and the damages which it has caused to your orators by its said wrongful acts; and that your orators may have such further relief in the premises as may seem equitable, and as the nature of the case may require:

May it please your honors to grant not only writs of injunction conformable to the prayer of this bill, but also a writ of subpœna directed to the said R. H. White Company commanding it to be and appear before this honorable court, then and there to answer the premises and to do and receive what to your honors may seem meet in the premises.

HOUGHTON, MIFFLIN & CO.,
By JAMES MURRAY KAY.

10 UNITED STATES OF AMERICA, } ss:
District of Massachusetts, County of Suffolk, }

On this twenty-sixth day of February, 1900, personally appeared James Murray Kay and made oath that he is one of the complainants herein, that he has read the foregoing bill of complaint and knows the contents thereof, and the same is true to the best of his knowledge and belief.

Before me,
[SEAL.] EDMUND A. WHITMAN,
Notary Public.

EXHIBIT A.

For and in consideration of one dollar to me in hand paid by Houghton, Mifflin & Company, of Boston, in the Commonwealth of Massachusetts, and for other good and lawful considerations, the receipt whereof is hereby acknowledged, I, Oliver Wendell Holmes, executor of the late Oliver Wendell Holmes of said Boston, hereby assign to said Houghton, Mifflin & Company all my right, title and interest in and to the copyright of the following-named works written by the late Oliver Wendell Holmes, in and for the United States of America, to wit: The Autocrat of the Breakfast Table; The Professor at the Breakfast Table; The Poet at the Breakfast Table; Over the Teacups; Elsie Venner, a Romance of Destiny; The Guardian Angel; A Moral Antipathy; Pages from an Old Volume of Life; Medical Essays; One Hundred Days in Europe; Poems, three volumes; John Lothrop Motley; A Memoir; Ralph Waldo Emerson; and of all other writings of said Oliver Wendell Holmes published and copyrighted in the United States in his lifetime. To have and to hold for the benefit of said Houghton, Mifflin & Company, their legal representatives and assigns, for the whole duration of the copyright of said works and any renewals thereof.

Witness my hand and seal this twenty-first day of February, A. D. eighteen hundred and ninety-five.

OLIVER WENDELL HOLMES. [SEAL.]

Witnesses:
RICHARD J. MURRAY.
JAMES L. EDWARDS.

11 The within assignment of copyright is this day recorded in the office of the Librarian of Congress, in conformity with the laws of the United States respecting copyrights.

Witness my hand and the seal of my office, this first day of March, A. D. 1895.

[SEAL.] A. R. SPOFFORD,
Librarian of Congress.

At the same term the following demurrer was filed:

Demurrer.

(Filed by consent March 30, 1900.)

The demurrer of R. H. White Company, the above-named defendant, to the bill of complaint of the above-named complainants.

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and for cause of demurrer shows that the complainants have not by their said bill made or stated such a case as entitles them or any of them in a court of equity to any relief against this defendant as to the matters contained in the said bill or any of such matters.

And for a further and more specific ground of demurrer to the said bill of complaint, this defendant shows that it affirmatively appears by the said bill of complaint that the work entitled "The Professor at the Breakfast Table" was published with the consent and under the authority of Oliver Wendell Holmes before he deposited a printed copy of the title thereof in the clerk's office of the district court for the district of Massachusetts; that the portion of "The Professor at the Breakfast Table" which was published in and as part of the December 1859 number of the "Atlantic Monthly" was on Dec. 22, 1859, and afterwards, published by Ticknor & Fields in and as part of a book entitled "The Professor at the Breakfast Table," and bearing no other title, the same being a totally different title from that under which said number of the "Atlantic Monthly" had been previously entered for copyright, to wit, "Number 26 Atlantic Monthly;" that no notice of the
12 copyright entered by Ticknor & Fields in the December 1859 number of the "Atlantic Monthly" was inserted in any of the copies of "The Professor at the Breakfast Table" published by Ticknor & Fields in separate book form, and that by reason of the omission of the name of Ticknor & Fields in the notice of copyright inserted in said copies, the requirements of the statute were not complied with in respect to notice of the copyright alleged to have been entered by Ticknor & Fields in "Number 26 Atlantic Monthly;" and that the copyright alleged to have been entered in the December 1859 number of the "Atlantic Monthly" expired in 1887, and it does not appear from said bill that the same was renewed or extended.

This defendant, further demurring to so much and such parts of the said bill of complaint as refer to the copyright therein alleged to have been entered in the book entitled "The Professor at the Breakfast Table," for cause of demurrer shows that it affirmatively appears by said bill of complaint that said work was published with the consent and under the authority of Oliver Wendell Holmes before he deposited a printed copy of the title thereof in the clerk's office of the district court for the district of Massachusetts.

This defendant, further demurring to so much and such parts of the said bill of complaint as refer to the copyright therein alleged to have been entered in the book entitled "Number 26 Atlantic Monthly, devoted to literature, art and politics, December, 1859," for causes of demurrer shows:

First. That the portion of "The Professor at the Breakfast Table" which was published in and as part of the December 1859 number of the "Atlantic Monthly" was on Dec. 22, 1859, and afterwards, published by Ticknor & Fields in and as part of a book entitled "The Professor at the Breakfast Table," and bearing no other title, the same being a totally different title from that under which said number of the "Atlantic Monthly" had been previously entered for copyright, to wit, "Number 26 Atlantic Monthly."

Second. That no notice of the copyright entered by Ticknor & Fields in the December 1859 number of the "Atlantic Monthly" was inserted in any of the copies of "The Professor at the Breakfast Table," published by Ticknor & Fields in separate book form, and that by reason of the omission of the name of Ticknor &
13 Fields in the notice of copyright inserted in said copies the requirements of the statute were not complied with in respect to notice of the copyright alleged to have been entered by Ticknor & Fields in "Number 26 Atlantic Monthly."

Third. That the copyright alleged to have been entered by Ticknor & Fields in the December 1859 number of the "Atlantic Monthly" expired in 1887, and it does not appear from said bill that the same was renewed or extended.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant demurs thereto and it prays the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

RALPH W. FOSTER,
Solicitor and of Counsel for Defendant,
53 *State Street, Boston.*

I hereby certify that I am of counsel for the defendant in the above-entitled cause, and that in my opinion the foregoing demurrer is well founded in law, and proper to be filed in the above cause.

RALPH W. FOSTER,
Of Counsel for Defendant.

Boston, March 24, 1900.

STATE OF MASSACHUSETTS, }
County of Suffolk, } *ss:*

George W. Crosby, being duly sworn, says that he is the treasurer of The R. H. White Company, the defendant in the above-entitled suit; that the foregoing demurrer is not interposed for the purpose of delay; and that the reason why this oath is not made by the R. H. White Company is that said company is a corporation.

GEORGE W. CROSBY.

Subscribed and sworn to before me this twenty-eighth day of March, 1900.

[SEAL.] RALPH W. FOSTER,
Notary Public.

14 This cause was thereupon, to wit, May 1, 1900, set down for hearing and was heard in part by the court, on demurrer, the Honorable Le Baron B. Colt, circuit judge, sitting.

This cause was thence continued to the May term, A. D. 1900, when on the sixth day of June, A. D. 1900, the hearing on the demurrer was concluded, the Honorable Le Baron B. Colt, circuit judge, sitting as aforesaid.

This cause was thence continued to the present October term, A. D. 1900, when the opinion of the court is announced and the following final decree is entered:—

Final Decree, March 29, 1901.

COLT, *J.:*

This cause came on to be heard at this term and was argued by counsel for the respective parties, and thereupon, it is ordered, adjudged and decreed that the demurrer to the amended bill of complaint herein be and the same is hereby sustained, and that the said amended bill of complaint be and the same is hereby dismissed with costs to the defendant to be taxed at fifty-one dollars and seventy-six cents ($51.76).

By the court,

BENJ. H. BRADLEE,
Deputy Clerk.

From the final decree the complainants claim an appeal to the United States circuit court of appeals for the first circuit, and give good and sufficient security that they will prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, and said appeal is allowed accordingly.

A true record:
Attest: ALEX. H. TROWBRIDGE, *Clerk.*

15 Circuit Court of the United States, District of Massachusetts.
In Equity.

GEORGE H. MIFFLIN ET AL.
v.
BENJAMIN F. DUTTON ET AL. } No. 1290.

GEORGE H. MIFFLIN ET AL.
v.
R. H. WHITE COMPANY. } No. 1232.

Opinion of the Circuit Court, March 18, 1901.

COLT, *J.:*

In *Holmes v. Hurst*, the supreme court held that the serial publication of "The Autocrat of the Breakfast Table" in the *Atlantic*

Monthly, a periodical magazine, vitiated a copyright of the whole book subsequently obtained by its author, Oliver Wendell Holmes. In the construction of sections 1 and 4 of the act of February 3, 1831, c. 16, the court observed: "The substance of these enactments is that, by section one, the author is only entitled to a copyright of books not printed and published; and by section four, that, as a preliminary to the recording of a copyright, he must, before publi-
cation, deposit a printed copy of the title of such book." 4
16 Stat. 436. In the course of its opinion, the court said: "We have not overlooked the inconvenience which our conclusions will cause, if, in order to protect their articles from piracy, authors are compelled to copyright each chapter or instalment as it may appear in a periodical; nor the danger and annoyance it may occasion to the Librarian of Congress, with whom copyrighted articles are deposited, if he is compelled to receive such articles as they are published in newspapers and magazines; but these are evils which can be easily remedied by an amendment of the law." 174 U. S. 82, 87, 90.

In the two cases at bar it appears from the allegations of the bills that, before any copyright was taken out, the first twenty-nine of the forty-two chapters of "The Minister's Wooing," by Harriet Beecher Stowe, were published in the serial numbers of the *Atlantic Monthly*, beginning with December, 1858, and ending with October, 1859; and that ten of the twelve parts of "The Professor at the Breakfast Table," by Oliver Wendell Holmes, were published in the serial numbers of the same magazine, beginning January, 1859, and ending with October, 1859.

In October, 1859, Mrs. Stowe took out a copyright in "The Minister's Wooing" as a whole, before its publication. The notice of copyright inserted in the book was as follows: "Entered according to act of Congress in the year 1859, by Harriet Beecher Stowe, in the clerk's office of the district court of the district of Massachusetts." After the publication of the book, the remaining thirteen chapters of "The Minister's Wooing" were published in the November and December numbers of the *Atlantic Monthly* for the year 1859. The publishers took out a copyright in these numbers of the magazine. The notice of copyright on the page following the title page was as follows: "Entered according to act of Congress, in the year 1859, by Ticknor & Fields, in the clerk's office of the district court of the district of Massachusetts."

By section five of the act of February 3, 1831, 4 Stat. 436, it is provided: "That no person shall be entitled to the benefit of this act, unless he shall give information of copyright being secured,
17 by causing to be inserted, in the several copies of each and every edition published during the term secured on the title page, or the page immediately following, if it be a book, * * * the following words, viz: 'Entered according to act of Congress, in the year ——, by A. B., in the clerk's office of the district court of ——.'"

Upon the authority of *Holmes v. Hurst*, *supra*, the first twenty-nine

chapters of "The Minister's Wooing" became public property; and we have only to consider whether a valid copyright exists in the remaining thirteen chapters. It is true that Mrs. Stowe, by taking out a copyright in her whole work in October, 1859, secured a valid copyright in these thirteen chapters. The question is, has she not vitiated this copyright by failing to insert the proper notice of her copyright in the November and December numbers of the *Atlantic Monthly*, in which this portion of her work was also published? The magazine contained a notice that it was copyrighted by Ticknor & Fields; and it is maintained that this is not a compliance with the notice required by section five of the act of February 3, 1831.

The law seems to be settled that the name of the party taking out the copyright must be inserted in the notice of every edition published; and that the failure to do this vitiates the copyright. A literal compliance with the statute may not be required, but the notice must contain the essentials of the name, claim of exclusive right, and the date when obtained. Under the authorities, I must hold that the insertion of the name "Ticknor & Fields" in the copyright notice in the *Atlantic Monthly* for the months of November and December, 1859, was an insufficient notice of Mrs. Stowe's copyright, and invalidates her right to any copyright in that portion of her book. The contention of the complainants that Ticknor & Fields were the agents for Mrs. Stowe, and that the insertion in the notice of the name of an agent sufficiently satisfies the requirements of the statute, is clearly unsound. *Thompson v. Hubbard*, 131
18 U. S. 123, 149, 150; *Lithographic Co. v. Sarony*, 111 U. S. 53, 55; *Osgood v. Aloe Instrument Co.*, 83 Fed. Rep. 470; S. C., 69 Fed. Red. 291; *Hoertel v. Tuch*, 94 Fed. Rep. 844; *Higgins v. Keuffel*, 30 Fed. Rep. 627; S. C., 140 U. S. 428; *Jackson v. Walkie*, 29 Fed. Rep. 15.

In "The Professor at the Breakfast Table" the facts alleged in the bill are somewhat different, although the case is governed by the same principle. The last two parts of this work were published in the December number of the *Atlantic Monthly* for 1859, and a copyright was taken out by Ticknor & Fields in that number. In the latter part of that month, Dr. Holmes entered his entire work for copyright, and subsequently published it, inserting the following notice in his book: "Entered according to act of Congress in the year 1859, by Oliver Wendell Holmes, in the clerk's office of the district court of the district of Massachusetts." A previous copyright having been obtained in the name of the publishers, Ticknor & Fields, the subsequent notice of copyright by Dr. Holmes in his book must be held insufficient under the cases above cited.

The demurrers to the bills are sustained, and the bills are to be dismissed.

Petition for Appeal and Assignment of Errors.

(Filed May 10, 1901.)

Petition for appeal.

The above-named complainants, considering themselves aggrieved by the final decree in the above-entitled cause sustaining the demurrer and dismissing the amended bill, hereby petition for an appeal from said decree to the United States circuit court of appeals for the first circuit, that a transcript of the record and a copy of the opinion of the court, filed in said cause, may be transmitted to the circuit court of appeals for the first circuit, and that a citation, in due form, be issued to the said R. H. White Company, citing and admonishing it to be and appear in the United States circuit court of appeals for the first circuit, pursuant to their appeal.

By their solicitors, ELDER, WAIT & WHITMAN.

19 *Assignment of Errors.*

Now come the complainants in the above-entitled cause, and file with their above petition for appeal this, their assignment of errors. The court erred,

1. In sustaining the demurrer to the amended bill of complaint.
2. In dismissing the amended bill of complaint.
3. In holding that the notice of copyright by Dr. Holmes in his work, "The Professor at the Breakfast Table," as issued by him in book form, was insufficient, and that his copyright was thereby lost.

By their solicitors, ELDER, WAIT & WHITMAN.

Bond to Party on Appeal.

(Filed and approved May 10, 1901.)

Know all men by these presents, that we, George H. Mifflin, of Boston, James Murray Kay, of Brookline, Henry O. Houghton, of Cambridge, Massachusetts, Lucy H. Valentine, Oscar R. Houghton and Albert F. Houghton, all of New York city, as principals, and Francis Jackson Garrison, Henry Nathan Wheeler, as sureties, are held and firmly bound unto R. H. White Company, a corporation having a usual place of business in Boston, Massachusetts, in the full and just sum of one thousand dollars, to be paid to the said R. H. White Company, its certain attorney, executors, administrators, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighteenth day of April in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a circuit court of the United States for the district of Massachusetts, in a suit in equity depending in said court between the said George H. Mifflin, James Murray Kay, Henry O.

Houghton, Lucy H. Valentine, Oscar R. Houghton and Albert F. Houghton, complainants, and the said R. H. White Company, respondent, a decree was entered against the said complainants, and the said complainants having obtained an appeal to remove said cause to the United States circuit court of appeals for the first circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said respondent citing and admonishing it to be and appear in the said United States circuit court of appeals for the first circuit, in the city of Boston, Massachusetts, on the seventh day of June, A. D. 1901.

20 Now, the condition of the above obligation is such, that if the said complainants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

GEORGE H. MIFFLIN. [SEAL.]
JAS. MURRAY KAY. [SEAL.]
HENRY O. HOUGHTON. [SEAL.]
LUCY H. VALENTINE. [SEAL.]
OSCAR R. HOUGHTON. [SEAL.]
ALBERT F. HOUGHTON, [SEAL.]
By JAS. MURRAY KAY.
FRANCIS JACKSON GARRISON. [SEAL.]
HENRY NATHAN WHEELER. [SEAL.]

Sealed and delivered in presence of
McDONALD ELLIS WHITE.

Approved:
LE BARON B. COLT,
Circuit Judge.

Notice of examination of sureties is hereby waived and I hereby assent to the allowance of the bond.

RALPH W. FOSTER,
Defendants' Solicitor.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to R. H. White Company, a corporation duly established according to law, and having its usual place of business in Boston, in the State of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Massachusetts, on the seventh day of June next, pursuant to an appeal duly obtained from a decree of the circuit court of the United States for the district of Massachusetts, wherein George H. Mifflin, of Boston, James Murray Kay, of Brookline,

Henry O. Houghton, individually and as trustee with Alberta M. Houghton, both of said Cambridge, under the will of Henry O. Houghton, deceased, all within the district of Massachusetts, Lucy H. Valentine, Oscar R. Houghton and Albert F. Houghton, all of New York, in the State of New York, and all citizens of the United States, copartners under the firm name of Houghton, Mifflin & Company, and having a usual place of business in Boston, in said district of Massachusetts, are appellants, and you are appel-
21 lees, to show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, judge of the circuit court of the United States for the district of Massachusetts, this tenth day of May, in the year of our Lord one thousand nine hundred and one.

LE BARON B. COLT,
U. S. Circuit Judge.

Acknowledgment of Service on Citation on Appeal.

BOSTON, MASS., *May* 20, 1901.

Service of the within citation is hereby accepted.

RALPH W. FOSTER,
Defendants' Solicitor.

Clerk's Certificate.

UNITED STATES OF AMERICA, *District of Massachusetts,* } *ss:*

I, Benjamin H. Bradlee, deputy clerk of the circuit court of the United States for the district of Massachusetts, within the first circuit, certify that the foregoing is a true copy of the record and all proceedings in the cause in equity entitled,

GEORGE H. MIFFLIN ET AL., Complainants,
v.
R. H. WHITE COMPANY, Defendants,
} No. 1232,

in said circuit court determined, the opinion of the circuit court of March 18, 1901, the petition for appeal and assignment of errors, the bond to party on appeal, and also the original citation issued upon the appeal of the complainants in said cause, with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this twenty-ninth day of May, A. D. 1901.

[SEAL.]

BENJAMIN H. BRADLEE,
Deputy Clerk.

22 *Motion to Amend Amended Bill of Complaint.*

(Filed in circuit court of appeals June 6, 1901, and allowed.)

It is moved that the bill may be amended, pursuant to the annexed agreement, by adding thereto the following:

The matter in controversy in this case exceeds in value $1000 besides costs.

ELDER, WAIT & WHITMAN,
Plaintiffs' Attorneys.

Agreement for Amendment to Amended Bill of Complaint.

It is agreed that the bill may be amended by adding thereto the following:

The matter in controversy in this case exceeds in value $1000 besides costs.

ELDER, WAIT & WHITMAN,
Plaintiffs' Attorneys.
RALPH W. FOSTER,
Defendant's Attorney.

23 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

GEORGE H. MIFFLIN ET AL., Complainants, Appellants,
v.
BENJAMIN F. DUTTON ET AL., Defendants, Appellees. } No. 387.

GEORGE H. MIFFLIN ET AL., Complainants, Appellants,
v.
R. H. WHITE COMPANY, Defendant, Appellee. } No. 388.

Appeals from the circuit court for the district of Massachusetts.

Before Putnam, Webb, and Aldrich, JJ.

Opinion of the Circuit Court of Appeals, January 16, 1902.

PUTNAM, *J.:*

The first of these appeals originated in a bill to protect an alleged copyright in a portion of "The Minister's Wooing," and the second in a portion of "The Professor at the Breakfast Table." In each there was a demurrer, a decree dismissing the bill with costs, and an appeal. The alleged copyrights were taken under the act
24 of February 3, 1831, c. 16, 4 Stat. 436, and each claims the benefit of a renewal. Some questions are made about the renewals, but we need not consider them.

Twenty-nine of the forty-two chapters of "The Minister's Wooing" were published in the serial numbers of the Atlantic Monthly, beginning with December, 1858, and ending with October, 1859. In

October, 1859, Mrs. Stowe took out a copyright of "The Minister's Wooing" as a whole, and in the book published by her authority a proper notice of this copyright is entered. Subsequent to taking out this copyright, the remaining thirteen chapters were published in the November and December numbers of the Atlantic Monthly for the same year. On the page following the title page of these numbers was printed the following: "Entered according to act of Congress, in the year 1859, by Ticknor & Fields, in the clerk's office of the district court of the district of Massachusetts." All the magazine publications were with the consent of Mrs. Stowe, under a formal contract between her and the publishers.

The bill does not state whether or not Ticknor & Fields took out a copyright of any kind. The circuit court found that the publication of the first twenty-nine chapters without any copyright abandoned them to the public, in which it was undoubtedly correct. It, also, found in substance that, as the remaining thirteen chapters were published with no notice of the copyright except that which we have stated, this, although giving information that somebody had copyrighted something, was not a sufficient notice of a copyright by Mrs. Stowe, even in view of the liberal rulings as to the permissible form of a notice found in *Burrow-Giles Lithographic Company v. Sarony*, 111 U. S. 53, 55, 56, and in other cases of like class. We agree with this proposition; but the case goes farther. The notice given by the publishers of the Atlantic Monthly was clearly a notice of a supposed copyright secured by themselves, and it contained nothing to indicate that it was a notice of one taken by Mrs. Stowe. The presumption, therefore, is that it was a notice of a copyright of so much of the Atlantic Monthly as the publishers were entitled to copyright in their own behalf. They could not then copyright "The Minister's Wooing," because it had already been copyrighted, and there cannot be two successive copyrights of the same publication. To permit this would render possible an extension of the statutory period through which a copyright runs, which, of course, the law will not allow. Therefore, on the whole, the just conclusion is that Ticknor & Fields published the November and December numbers of the Atlantic Monthly, not only without any notice of Mrs. Stowe's copyright which was sufficient in law, but only with one which was presumably a notice of a copyright of their own.

With reference to "The Professor at the Breakfast Table," as the learned judge of the circuit court well said, the sequence of the facts is different, but the case is governed by the same principles. Ten of the twelve parts of this work were published in the serial numbers of the Atlantic Monthly, beginning in January, 1859, and ending in October, 1859, without any notice of any copyright. The remaining two parts were published in the following December number, as to which the bill states that a copyright was obtained by Ticknor & Fields, and a notice thereof given on the page following the title page, in the precise form which we have already stated in regard to "The Minister's Wooing." Afterwards, Dr. Holmes published the entire work in one volume, containing the following

notice: "Entered according to act of Congress in the year 1859, by Oliver Wendell Holmes, in the clerk's office of the district court of the district of Massachusetts." In this case, there is an allegation that Dr. Holmes took out a copyright in his own behalf; so that the same observations apply even more positively to the notice given by him which we made with reference to that printed by Ticknor & Fields with regard to "The Minister's Wooing;" that is to say, it was a notice of a copyright taken out by him, and not of that taken out by Ticknor & Fields. While, therefore, as already said, we agree with the line of reasoning of the learned judge of the circuit
26 court, we may add the same conclusion as with reference to the other case, that, in the volume published by Dr. Holmes, no notice was given, or intended to be given, of the copyright taken out by Ticknor & Fields.

We ought to observe that the publication by Ticknor & Fields was with the authorization of Dr. Holmes, under a contract with him; so that he is chargeable with what was done by them. We ought, also, to add that, while it is possible that, in some aspects of the law, Ticknor & Fields might have obtained a copyright in behalf of themselves and of Dr. Holmes which would have protected the interests of both, and that, thus, Ticknor & Fields might have become a trustee of a copyright in behalf of both, yet there is no allegation in the bill to that effect. Therefore, inasmuch as the copyright taken out by Dr. Holmes was insufficient to protect any part of his volume, because the whole had received prior publication, and, as we have said, there cannot be successive copyrights, and inasmuch, also, as he published the only parts which could be regarded as protected by the prior copyright without giving notice thereof, it necessarily follows that the conclusion of the circuit court that the whole work was, in the end, abandoned to the public, was correct.

In No. 387, *Mifflin v. Dutton, the decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellees.*

In No. 388, *Mifflin v. R. H. White Company, the decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellees.*

27 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

GEORGE H. MIFFLIN, ET AL., Complainant-, Appellant-,
v.
R. H. WHITE COMPANY, Defendant, Appellee. } No. 388.

Final Decree in Circuit Court of Appeals, January 16, 1902.

This cause came on to be heard October 16, 1901, upon the transcript of the record of the circuit court of the United States for the district of Massachusetts, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed as follows: The decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellee.

By the court,

JOHN G. STETSON, *Clerk.*

28 United States Circuit Court of Appeals for the First Circuit.

GEORGE H. MIFFLIN ET AL., Complainants, Appellants, } No. 388.
v.
R. H. WHITE COMPANY, Defendants, Appellees.

Complainants' Appeal.

(Filed in circuit court of appeals February 13, 1902, and allowed.)

The above-named complainants, George H. Mifflin *et al.*, conceiving themselves aggrieved by the decree entered on January 16, 1902, in the above-entitled proceeding, do hereby appeal from said decree to the Supreme Court of the United States, and pray that this their appeal may be allowed, and that a transcript of the record proceedings and papers, upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

ELDER, WAIT & WHITMAN,
Of Counsel for Complainants.

Boston, Mass, February 4, 1902.

Assignment of Errors.

And now come the complainants in the above-entitled cause and file with their above appeal, this their assignment of errors. The court erred:

1. In affirming the decree of the circuit court.

2. In holding that the notice of copyright by Dr. Holmes of "The Professor at the Breakfast Table," as issued by him in book form, was insufficient, and that her copyright was thereby lost.

By their solicitors, ELDER, WAIT & WHITMAN.

29 *Bond to Party on Appeal.*

Know all men by these presents, that we, George H. Mifflin of Boston, James Murray Kay of Brookline, Henry O. Houghton of Cambridge, Massachusetts, Lucy H. Valentine, Oscar R. Houghton and Albert F. Houghton, of New York city, as principals, and Francis J. Garrison of Lexington and Henry N. Wheeler of Cambridge, as sureties, are held and firmly bound unto R. H. White Company, a corporation, having its usual place of business in Boston, in the full and just sum of one thousand dollars to be paid to the said R. H. White Company, its certain attorney, executors, administrators, its successors, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the twelfth day of February, in the year of our Lord one thousand nine hundred and two.

Whereas lately at a United States circuit court of appeals for the first circuit in a suit in equity depending in said court between George H. Mifflin *et al.*, complainants, appellants, and R. H. White Company defendant, appellee, decree was rendered against the said

appellants and the said appellants having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said R. H. White Company, appellee, citing and admonishing it to be and appear in the said Supreme Court of the United States at Washington within thirty days from the date hereof:

Now the condition of the above obligation is such, that if the said appellants shall prosecute their said appeal to effect, and answer all damages and costs, if they fail to make their appeal good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

GEORGE H. MIFFLIN, [SEAL.]
By JAS. MURRAY KAY.
JAMES MURRAY KAY. [SEAL.]
HENRY O. HOUGHTON, [SEAL.]
By JAS. MURRAY KAY.
LUCY H. VALENTINE, [SEAL.]
By JAS. MURRAY KAY.
OSCAR R. HOUGHTON, [SEAL.]
By JAS. MURRAY KAY.
ALBERT F. HOUGHTON, [SEAL.]
By JAS. MURRAY KAY.
FRANCIS J. GARRISON. [SEAL.]
HENRY N. WHEELER. [SEAL.]

Signed, sealed and delivered in presence of
ROGER L. SCAIFE,
4 *Park St., Boston.*

Approved:
Feb. 13, 1902.
W. L. PUTNAM.

Notice of examination of sureties is hereby waived; and I assent to the allowance of this bond.

RALPH W. FOSTER,
Defendants' Solicitor.

30 United States Circuit Court of Appeals for the First Circuit.

GEORGE H. MIFFLIN ET AL., Complainants, Appellants,
v.
R. H. WHITE COMPANY, Defendant, Appellee.
No. 388.

Clerk's Certificate.

I, John G. Stetson, clerk of the United States circuit court of appeals for the first circuit, certify that the foregoing transcript in the above-entitled cause, to which this certificate is annexed, contains and is a true copy of the record and all proceedings in said cause lately determined in said circuit court of appeals, the original record thereof remaining in my office, and that annexed hereto is the original citation issued upon the appeal of said complainants to the Supreme Court of the United States.

In testimony whereof, I hereunto set my hand and affix the seal of said United States circuit court of appeals for the first circuit, at Boston, in said first circuit, this third day of March, A. D. 1902.

[Seal United States Circuit Court of Appeals, First Circuit.]

JOHN G. STETSON, *Clerk.*

31 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the R. H. White Company, a corporation duly established according to law and having its usual place of business in Boston, in the district of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to an appeal claimed and allowed by the United States circuit court of appeals for the first circuit in a cause wherein George H. Mifflin of Boston, James Murray Kay of Brookline, Henry O. Houghton, individually and as trustee with Alberta M. Houghton both of Cambridge, under the will of Henry O. Dutton, deceased, all within the State and district of Massachusetts, and Lucy H. Valentine, Oscar R. Houghton and Albert F. Houghton all of New York in the State of New York, copartners under the firm name of Houghton, Mifflin & Company are complainants and appellants and you are defendant and appellee, to show cause, if any there be, why the decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William L. Putnam U. S. circuit judge, this thirteenth day of February, in the year of our Lord one thousand nine hundred and two.

W. L. PUTNAM,

U. S. Circuit Judge and Judge of the United States Circuit Court of Appeals for the First Circuit, Presiding in the Above-named Cause.

BOSTON, MASS., *Feb.* 27, 1902.

Service of the within citation is hereby accepted.

RALPH W. FOSTER,

Solicitor for Defendant, Appellee.

Endorsed on cover: File No. 18,442. U. S. C. C. of appeals, 1st circuit. Term No. 268. George H. Mifflin, James Murray Kay, Henry O. Houghton, individually & as trustee with Alberta M. Houghton under the will of Henry O. Dutton, dec'd, *et al.*, copartners, &c., appellants, *vs.* The R. H. White Company. Filed March 7", 1902.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

GEORGE H. MIFFLIN ET AL.

No. 267. *v.*

BENJAMIN F. DUTTON ET AL.

GEORGE H. MIFFLIN ET AL.

No. 268. *v.*

THE R. H. WHITE COMPANY.

BRIEF FOR THE APPELLANTS.

STATEMENT OF THE CASES.

These are two bills in equity against booksellers for the infringement of the copyrights in "The Professor at the Breakfast Table," by Dr. Oliver Wendell Holmes, and "The Minister's Wooing," by Mrs. Harriet Beecher Stowe. A demurrer was filed to each bill, which has been sustained in the Circuit Court and in the Circuit Court of Appeals, and the questions arising thereon now come to this court on appeal. The infringements complained of are some of the fruits of the controversy in Holmes *v.* Hurst, 174 U. S. 82, as the books here complained of are published by the defendant in that case. It appeared in that case that the publishers of the *Atlantic Monthly* had neglected properly to secure copyright during the year 1858, and consequently "The Autocrat of the Breakfast Table," which was published serially in that magazine during that year, became public property. The works involved in the present suits were published serially in the same magazine during 1859, and the publishers were seemingly equally forgetful in securing copyright, but a closer examination showed that a valid copyright was secured on the December number, and that "The Minister's Wooing" was published in book form and properly entered for copyright before the publication in the magazine of

the last thirteen chapters, which appeared in the November and December numbers.

The facts in the two cases are different, in that "The Professor At The Breakfast Table" did not appear in book form until after the completion of the serial publication in the magazine, so that only that portion of the book which had appeared in the December number is claimed to be under copyright. "The Minister's Wooing," however, was published in book form and duly copyrighted before the issue of the November number, so that the thirteen chapters appearing in the November and December numbers are claimed to be under copyright.

These suits were brought to enjoin the sale of books containing the concluding portions of both stories on which we claim that the copyright was good, and for an accounting for the sale of books so unlawfully published.

The facts, and contentions, with relation to each book may be more specifically stated as follows: —

"THE PROFESSOR AT THE BREAKFAST TABLE."

This work, as has been said, was not published in book form until after it had been serially published in the *Atlantic Monthly*. The copyright notice in the book was in the name of Dr. Holmes, while the only copyright notice in the December number of the magazine in which the last instalment of the story appeared was in the name of Ticknor & Fields, the publishers. Dr. Holmes took the proper steps for the renewal of his copyright at its expiration, if the deposit of the title and copies of the book, and not of the magazine in which it originally appeared, constituted a renewal and such renewed copyright was assigned to appellants.

This action is brought to restrain the publication of a book containing the instalment published in the December number, on which copyright was duly claimed, and for the profits from such sale.

The questions raised by the demurrer in this case are four, only the first of which has been discussed in the opinions of the courts below.

(1) Whether copyright notice in the work when published in book form in the name of Dr. Holmes instead of the publishers, in whose name the notice had appeared in the December number, destroys his copyright, although proper notice was at all times given in his name in the publication in book form.

(2) Whether the publication of the earlier instalments without

copyright being secured prevents the copyright on the remainder from having validity, on the ground that the whole story constitutes one work.

(3) Whether the publication of the book under its proper title destroys copyright because the entry for copyright had been made as a part of the *Atlantic Monthly* and under its title.

(4) Whether the copyright was properly renewed by deposit by Dr. Holmes of the title of his work and a copy of it, the defendant claiming that the copyright could only be renewed by deposit of a copy of the magazine in which the work originally appeared.

The appellants contend, —

First. That notice in the name of the author and owner of the copyright is correct, the publishers acting as his agents in protecting his work as part of the magazine that no one was, or could have been, misled, and that the change in the form of the copyright notice from the magazine to the book does not affect the author's rights, because the statute requiring notice has been ***substantially complied with,*** for the reasons set forth below in connection with "The Minister's Wooing."

Second. That copyright can always be secured for a part of an entire work, even if copyright on the other part has been lost.

Third. That the copyright on a magazine covers all its contents and their titles, and each separate article may be republished under its proper title without losing such copyright. To require each article to be republished under the name and number of the magazine would cause endless and absurd confusion. We contend that an author may change the title of his work as often as he pleases without impairing the validity of his copyright, as the statute is silent as to change of title.

Fourth. That the renewal right under the statute belongs to the author alone, and the statute was complied with.

"THE MINISTER'S WOOING."

"The Minister's Wooing" appeared serially in the *Atlantic Monthly* during the year 1859. The contract between Mrs. Stowe and her publishers, Phillips, Sampson & Company (No. 267, Rec., page 6), provides that all rights of republication in book form were reserved to the author. Owing to the publisher's neglect, the author failed to establish her copyright in the first twenty-nine chapters, which appeared in the first ten numbers of the *Atlantic Monthly* for the year. After these had appeared, the author published the whole work in book form on October 15, 1859, and

proper steps were taken to secure copyright on the book, notice of copyright being given therein in the name of Harriet Beecher Stowe. At the date of this publication the last thirteen chapters of the work had not been otherwise published, but were subsequently in the November and December numbers by Ticknor & Fields, to whom the *Atlantic Monthly* had been sold, and in accordance with an arrangement with Mrs. Stowe by which the contract between her and Phillips, Sampson & Company was assigned to Ticknor & Fields. These two numbers contained on the page following the title page a copyright notice in the name of Ticknor & Fields, and in addition contained on the pages on which the instalments of the story began, a notice that copyright had been secured in Great Britain and France. The author took the necessary steps to renew her copyright in 1887 before it expired, and the renewed copyright was duly assigned to the appellants. The questions raised by the demurrer are two, only the first of which has been discussed in the opinions of the courts below.

One, — whether the failure to insert a copyright notice ***in the name of the author*** in the November and December numbers of the *Atlantic Monthly* destroys her copyright, although proper notice was given ***in the name of the publishers*** who had by contract a limited interest in her copyright.

Two, — whether the publication of a portion of the book before the initial step to secure copyright was taken destroys copyright on that portion of the book subsequently published, this being identical with the second contention in the "Professor" case.

The appellants contend, —

First, — that in spite of a variance between the form of the copyright notice in the book and in the magazine, the statute requiring notice has been ***substantially complied with***, as the notice in the magazine was in the name of the publishers, who were the agents and representatives of the author in making the serial publication, and no one could be possibly misled by the variance.

Second, — that conceding that copyright on the first twenty-nine chapters of the book has been lost, yet the copyright on the chapters published after the proper entry for copyright had been made is good, and an account should be ordered for any profits made by the appellees therefrom.

Although the copyright in each case has expired since the bills were filed, and consequently an injunction will no longer be of

value, an account remains to be taken, if the appellants are entitled to recover. These cases are of far-reaching consequence, however, to both authors and publishers, as the procedure as to copyright notices in these cases has been followed for many years in case of works originally appearing in magazines. Some of our most famous literary works have thus appeared, and it has been an almost universal custom to give copyright notice in the name to the author when the work is republished in book form. It is only in recent years that, in an excess of caution, notice in the author's name has been inserted in the magazine in addition to the notice in the name of the publishers. A decision dismissing the bills in this case would therefore put in jeopardy many valuable copyrights throughout the United States. It has also been the custom of a publisher in issuing an edition of a work originally published by another publisher who has given the copyright notice in his own name, to change the name in such notice to his own, so as to eliminate entirely from the title page the name of the original publisher. Neither publisher had any other than a contract interest in the copyright, and each was acting for and in behalf of the author in giving the notice. If such change in the form of notice is bad, many valuable copyrights will be destroyed by a decision to that effect.

POINTS OF ARGUMENT.

I. The copyrights in these cases are good, and the change of name in the notices from publisher to author in Dr. Holmes' case, and from author to publisher in Mrs. Stowe's case, is an immaterial variance, because: —

(*a*) The decisions in the United States have never held a copyright bad unless some essential element in the notice has been wholly omitted, or unless it is misleading.

(*b*) Many informalities in such notices have been sustained, so long as they contained all the elements and did not mislead, and the statute had been substantially complied with.

(*c*) No one has been misled in these cases, or could have been misled by the notices complained of.

(*d*) The statute has been substantially complied with because: —

1. A magazine notice is distributive and protects the work of each contributor, although he is not specially named in the notice.

2. The relation between author and publisher is so close as to constitute such an identity of interest that notice in the name of the publisher is equivalent to notice in the name of the author.

3. The law secures copyright to the author alone, and it belongs to him, although registered in the name of his publisher.

4. Where copyright is registered in the publisher's name, the courts treat the author as the real owner, and allow suits by him for protection of his copyright.

5. The copyright protection secured by the publisher of a magazine enures to the benefit of each contributor and secures copyright to each.

6. The appellees are seeking to take advantage of an attempt by the author to secure copyright twice, and claim that double notice to them is no notice at all.

(*e*) The statutory protection of literary property is a compensation given by the public to the author for dedicating his work to the public, and the public faith is pledged to secure him in his rights.

(*f*) The history of the copyright idea in America shows the solicitude of the State for the author and his rights.

(*g*) The history of the notice clause shows that its purpose is merely to prevent the ignorant from being misled to their harm.

(*h*) The English decisions show that the name in a notice may be changed as the proprietorship of the copyright changes, so long as the change is not misleading.

II. Copyright may be secured for part of a work.

III. The use of the separate and proper title of a magazine article on republication in book form is not a change of title, and even if it were the author may change the title of his copyrighted work on a subsequent publication.

IV. Copyright may be renewed by an author, although the original steps to secure it were taken in the name of his publishers and for a magazine of which the copyrighted work was but a part.

ARGUMENT.

I.

The principal question in these cases is whether the change of the name in the copyright notices

from publisher to author, or vice versa, destroys the copyrights.

The main question in these cases is the one which has been considered in the courts below, namely, whether the clause of the statute requiring a notice of copyright to be printed in each copy of the work is to be construed strictly and technically, or whether, considering the history and purpose of this clause, the court will say that a form of notice is good which contains the essential features required by statute, to wit, the name, claim of exclusive right, and date when obtained; in other words, whether the change in the notice from the publishers' name to that of the author vitiates the copyright of "The Professor," and whether the change from the author's name to that of the publishers is equally fatal to "The Minister's Wooing."

The solution of this question depends partly upon a consideration of the effect of the statute on literary property, and partly on the basis of, and reasons for, this requirement of notice.

A careful examination of the decisions in our own courts on this notice requirement will show the liberality that has been freely exercised in sustaining defective or informal notices.

(a) The decisions in the United States on the requirement of notice have never held a copyright bad unless some essential element has been wholly omitted, or such notice is misleading.

Coming to the consideration of the law in the United States, it is noted that this question is to be determined under the Act of 1831.

Bulletin No. 3, of the Copyright Office, p. 35.

The fifth section thereof prescribing the form of notice is as follows:—

"No person shall be entitled to the benefit of this act unless he shall give information of copyright being secured, by causing to be inserted, in the several copies of each and every edition published during the term secured, on the title page, or the page immediately following, if it be a book, . . . the following words, viz.: 'Entered according to act of Congress, in the year ——, by A. B., in the clerk's office of the district court of ——.'"

It will be noticed that it is less precise in its terms in regard to the name of the party to be inserted in this notice than is the statute now in force, Act of June 18, 1874, Sect. 1.

Bulletin No. 3, p. 54.

In the latter statute it is further provided that the notice shall contain "The name of the party by whom it was taken out," and it has been said that this quoted clause was "added for the purpose of preventing any ambiguity as to the character of the notice which should accompany the use of the word copyright,"

Werckmeister *v.* Springer Lith. Co., 63 Fed. Rep. 808, per Townsend, J.

In fact, the earlier statute, as will be seen on examination, was not precise at all, and in using the initials "A. B." in Sect. 5, it is submitted that they were used merely to fill the blank and to indicate that some name was to be inserted. As there is no reference to the preceding section, where the letters A. B. are used to fill in one blank as well as the letters C. D. to fill another, it cannot be necessarily said that the legislature intended that the party designated by A. B. was to be the same in the two sections.

A. B. may be a shifting or changing party. In the case of Rock *v.* Lazarus, L. R. 15 Eq. 104, the parties composing Rock & Co. changed from time to time, and were different parties from those composing the firm at the time the notice was first engraved.

See, also,

Scribner *v.* Clark, 50 Fed. Rep. 473.

The decisions have universally been opposed to any insistence on a literal compliance with the terms of the statute in regard to the form of this notice. It is enough if the notice calls attention to the claim of copyright, the year in which the claim was made, and some duly authorized person of whom inquiry can be made. The real name of the person claiming copyright need not appear, but a trade name is sufficient.

Bleistein *v.* Donaldson Lith. Co. decision in this court Feb. 2, 1903.

Scribner *v.* Henry G. Allen Co., 49 Fed. Rep. 854.

Scribner *v.* Clark, 50 Fed. Rep. 473, s. c. 144 U. S. 488.

Werckmeister *v.* Springer Lith. Co., *ubi supra.*

In this last case Judge Townsend said, and here he was speaking of the present statute: —

"The object of the statute was to notify the public of the claim of copyright and to enable it to ascertain the party by whom it was taken out. . . . If any one desires to ascertain who claims the copyright of this painting, he will more readily succeed if informed that the owner is Photographische Gesellschaft, than if he is informed that it is Emil Werckmeister."

In the same way it furnished more information to inquirers to know that application could be made to Ticknor & Fields, publishers, having a well-known place of business, than to Harriet Beecher Stowe or Dr. Oliver Wendell Holmes, and this is particularly true of a serial publication. Any person desiring to secure the right to publish the work in book form, or any other inquirer, would naturally either address the publishers directly or address the author in care of the publishers.

This suggestion would have less force if there were not a relation between author and publisher by which there was a joint interest in the copyright. In these cases, the publishers had, by contract, a right to the serial publication, and in making this publication they were also acting as the agents and representatives of the author. A magazine copyright is distributive and secures to each author publishing his work in the magazine his copyright. By this we do not mean that the copyright as a grant of monopoly from the Government is divided into fractions. There is no such grant of monopoly, and the certificate of record by the Librarian of Congress has no analogy or resemblance to the patent issued under the seal of the Government in case of inventions. The author's literary property is secured to him by conforming, either through himself or his agent, to certain statutory requirements. In the case of a magazine it is commonly and inaccurately said that the copyright is taken out by the publishers and belongs to them. That is not true, except in those few cases where they are also the proprietors of the literary material, but where the authors reserve to themselves the property in their compositions and the right of republication in book form, the proprietor of the magazine has no more than the limited right of serial publication for which he has contracted, and incidentally the right to protect himself in that property.

We shall refer again to this branch of the subject, and we return to the consideration of the interpretation of the notice clause by our courts.

In

Sarony *v.* Burrow-Giles Lith. Co., 17 Fed. Rep. 591,

Judge Coxe said, where it was objected that the notice did not contain the Christian name of the holder of the copyright: —

"The object of the statute was to give notice of the copyright to the public; to prevent a person from being punished who *ignorantly and innocently* reproduces the photograph without the knowledge of the protecting copyright. . . . The strict technical rules of pleading in the criminal courts furnish but slight analogy for the guidance of the courts in determining what interpretation shall be given to this statute." (Italics are ours.)

When this case was heard by this court on appeal it was said that the object of the statute is to give notice to the public "of the name of the *author*." This is exactly what was done in the book notice of Dr. Holmes' copyright. Undoubtedly that phraseology was used with reference to the facts of that case, and had the facts called the attention of the court to a case where the notice was in the name of the publisher or proprietor, it would certainly have used some phrase equivalent to the name of the author or some one acting for or on behalf of him. What the court meant, we submit, was that the public were entitled to a proper source of information as to the ownership of the copyright.

Lithographic Co. *v.* Sarony, 111 U. S., 53.

In

Hoertel *v.* Tuck, 94 Fed. Rep. 844,

Judge Lacombe says: —

"While the courts have been liberal in holding *any form of notice* sufficient which contains the essentials, — 'the name, claim of exclusive right, and date when obtained,' — they have not yet sustained the sufficiency of a notice which *wholly omits* some one of these three essentials."

The italics in the above quotation are ours, but we submit that the courts have never gone further than this statement as thus emphasized. There must be an entire omission of some one or more of the three essentials, and there is no case where a copyright has been held to be lost by reason of a defective notice, except where some essential element required by the statute has been ***entirely omitted;*** such, for instance, as the date,

Thompson *v.* Hubbard, 131 U. S. 123.
Osgood *v.* Aloe Instrument Co., 69 Fed. Rep. 291,

or the place where the deposit of copy and title is required to be made,

Jackson *v.* Walkie, 29 Fed. Rep. 15,

(although we submit that this case was wrongly decided on too literal an interpretation of the statute), or some word, such as "registered" is used instead of "copyright"; the two words conveying, as the court points out, widely different meanings.

Higgins *v.* Keuffel, 140 U. S. 428.

The six cases just cited are those relied on by the circuit judge in his opinion. We have no quarrel with them, as they do not touch our contention that the change of name from principal to agent or *vice versa* is not an *entire omission* of name, and as we have pointed out, they decide nothing more than that such omission of an essential feature of the notice is fatal.

(b) Many informalities in such notices have been sustained, so long as they contained all the elements and did not mislead, and the statute had been substantially complied with.

On the other hand, a wide range of informality has been disregarded by the courts. In

Snow *v.* Mast, 65 Fed. Rep. 995,

Judge Sage, in upholding an abbreviated date of "'94" in a copyright notice, said in defence of this abbreviation: —

"The object of the statute is to give notice of the copyright to the public, and it would be too narrow a construction to hold that the abbreviation '94 is insufficient. In Werckmeister *v.* Mfg. Co., 63 Fed. Rep. 445, 452, the court said that there was enough in the notice to give any one who was looking for the truth and desiring to avoid infringement the thread which would lead him easily to the *actual condition of the copyright*, and held that this was sufficient."

This was not exactly the language of Judge Putnam in that case, but that judge did say, in referring to the case of Lithograph Co. *v.* Sarony in this court: —

"Thus in a single sentence the Supreme Court has torn down the structure of apparent literalness on which the defendant relies."

There can be no pretence in these cases that the publisher of the infringing books here complained of could not have found in either

form of notice not only the thread which would have easily led him to the actual condition of the copyright, but all the necessary information, had he been "*looking for truth and desiring to avoid infringement.*" There can be no doubt that this is a case where the reprinter rests his defence on what he claims is a technical defect in the complainant's copyright, and not in the least on any mistake he has made by reason of any act, or omission, of either the authors or their publishers.

In

Falk *v.* Schumacher, 48 Fed. Rep. 222,

Judge Coxe swept aside an objection to the form of notice, saying,

"The statute was ***substantially*** complied with."

See, also,

Hefel *v.* Whitely Land Co., 54 Fed. Rep. 179.

In

Bolles *v.* Outing Co., 77 Fed. Rep. 966,

the Circuit Court of Appeals held that the notice "Copyright '93 by Bolles, Brooklyn," was a sufficient compliance with the statute, although strictly and technically the identification of the author and the date were not as required by the statute, the court entering into a somewhat elaborate argument to show that '93 must mean 1893 and not 1793, because photography was not invented at the earlier date, adding, —

"Could any person possibly be ***misled*** by the omission of the figures denoting the century."

Judge Wallace at the same time called attention to the general rule of law that in any notice prescribed by law the *full name* of the party must be given for the purpose of identification, and a designation by the initial letter or letters of the first name will not suffice.

The true test of the sufficiency of a copyright notice is its likelihood to mislead.

We submit that the true test of the sufficiency of a notice lies in an answer to the question whether the notice is in any way ***likely to mislead*** any one as to the rights of the authors or the owners of the literary property which they are about to appro-

priate. Whether or not the notice is calculated to mislead any one to his injury is the real and only test, assuming that the three essential elements of the statute appear in some form. This test was laid down with great force in

Callaghan *v.* Myers, 128 U. S. 617,

where the printed title was deposited by "E. B. Myers and Chandler," while the notice in the published books was by "E. B. Myers" alone. This court held the ***"Variance immaterial and the statute substantially complied with, particularly as it was not shown that the defendants were misled by the variance or induced to do or omit anything because of it."*** This case is important because it shows the lengths to which this court has gone in upholding a copyright. Here the title was deposited January 28, 1867, while the notice in the book gave the year as 1866. The statute provides (Rev. Stat., Sec. 4953) that "copyright shall be granted for the term of twenty-eight years from the *time of recording the title thereof*"; in this case from January 28, 1867. This court brushed aside the literal interpretation of the statute, and said: —

"The variance is immaterial, inasmuch as the statement that the title was recorded in an earlier year than the actual year, being conclusive upon the person taking the copyright, could cause no injury to any other person or to the public, because the copyright would expire twenty-eight years from the expiration of the year stated in the notice in the book and *not twenty-eight years from the time of the recording of the title.*"

It would have been a simple thing for this court to have followed the narrower construction of the statute by the Circuit Court in the earlier case where a mistake in the date was held fatal,

Baker *v.* Taylor, 2 Blatch. 82;

see, also,

Schumacher *v.* Wogram, 35 Fed. Rep. 210;

but this court was clearly not inclined to place any narrow construction upon the requirements of the notice clause of the statute.

Another test is whether the statute has been substantially complied with.

The rule has been laid down in another form by Judge Drummond, when the case of Myers *v.* Callaghan was heard in the

Circuit Court (5 Fed. Rep. 726), that the statute must be "***substantially and in good faith complied with,***" and if that appears, the court looks no further. He says: —

"It may be admitted, therefore, that every person who claims a copyright to a book, conferred by act of Congress, must show that the provisions of the act have been complied with. But there is what may be called the original right of the author. It is the object of the act of Congress to 'secure' the right which thus primarily exists. Indeed, statutes of copyright seem to imply the existence of a natural right of the author to the product of his brain. They are passed in order to make that right after publication, in the language of the constitution, 'exclusive.' So that I am not inclined to agree with the strict construction which has been placed on the acts of Congress by some of the courts. It seems to me, on the contrary, that these various provisions of law in relation to copyright should have a liberal construction, in order to give effect to what may be considered the inherent right of the author to his own work."

In Dwight *v.* Appleton, 1 N. Y. Leg. Obs. 195, a work was published in five volumes, and the copyright notice appeared only in the first volume. The case was heard in the Circuit Court before two judges, and it was held "that full notice had been given to the public of the plaintiff's copyright in this work, and, in the opinion of the court, the law had been ***substantially complied with,***" and the decision was based on the ground that the copyright acts "are remedial, and made in favor of the aggrieved party, and to secure his rights."

Why should the author lose the fruits of his labor and be obliged to see it appropriated by a pirate who has not a shadow of a claim that he acted in ignorance of the author's rights? We concede that the courts have no power to protect an author who has not complied with the requirements of the statute. If he has wholly omitted his notice or some essential portion of it, the courts cannot, it is true, repair the omission, but, following the reasoning of Marshall, C. J., in Grant *v.* Raymond, *infra*, the courts can protect him from the consequences of an innocent or inadvertent mistake. The court could not have upheld the reissued patent if some condition precedent had been *wholly* omitted by the inventor, but if this court can say that specifications which do not describe the invention can form a basis for a valid patent, it is surely within its power to say that a copyright notice which names the agent instead of the principal protects the author in his property. The two forms of notice give the public a full and accurate state-

ment of the situation. The reader of the magazine learns from the notice therein that the publishers have an interest in the serial publication, and the public are warned that it cannot be reproduced without their permission. The reader of the book learns from the notice therein that the author has reserved to himself the right of publication in book form. Who can be *misled* by this double form? How can it relieve the pirate from liability to know that republication by him may expose him to litigation from two sources?

(c) No one has been misled in these cases or could have been misled by the notices complained of.

As to "The Minister's Wooing," it cannot fairly or with even a show of right be contended that the publishers of the work which the defendants are selling were *misled* or deceived by the notice of copyright. The demurrer admits that "all of which copies were copied by defendants from said thirteen numbers of the *Atlantic Monthly*, and were exact copies, word for word." In making this exact copy of the last thirteen chapters of "The Minister's Wooing" their eye must have been arrested by the words "Copyright secured by the author in Great Britain and France." It is inconceivable that they supposed that "the author" had neglected the much more important protection of the work in the land of its birth. They also saw that the entire contents of the magazine were protected. In whose name? In the name of her publishers. No one familiar with the publishing business could have failed to understand the situation. There was some publishing arrangement between Mrs. Stowe and her publishers by which they had some right of publication and she had the general right. The notices told the exact fact. By assignment of Phillips, Sampson & Co., whose work for ten months the defendants had been copying, "word for word," Ticknor & Fields had the serial rights for the remaining chapters. The notice of serial rights in the publisher of a magazine carries with it notice of the author's general copyright.

As to "The Professor at the Breakfast Table," it cannot be contended that any one has been *misled* by this change in the form of the notice. When the magazine was published, the public were duly informed by the notice on the titlepage that copyright on that issue of the magazine, and on each and every article therein, had been duly secured. In so entering the magazine for copyright, the publishers were acting in behalf of, and as the agents

for, each and every author giving them a right of publication in that issue. Later, when "The Professor at the Breakfast Table" appeared in book form, the notice of copyright informed the public that the registration of the magazine for copyright by the publishers was, so far at least as "The Professor at the Breakfast Table" was concerned, made by them as agents for, and in behalf of, Dr. Holmes and to secure *his* copyright. The public were thus informed of the entire transaction. They were notified that the publishers were protected in their right to multiply copies of the magazine; and they were further notified that, so far as Dr. Holmes was concerned, the publishers had no greater right, inasmuch as helater gave notice in his own name of his copyright and the right reserved to him to reproduce the work in book form. When the sale for the magazine was at an end, the publishers had then no more than a nominal interest in the copyright, and further notice in their names was calculated to mislead the public as to the real ownership of the copyright.

(d) The statute has been substantially complied with because:—

1. The magazine notice is distributive and carries entire protection for each contributor, although not specially named in the notice.

It has been claimed hitherto that the notice in the November and December numbers of the magazine was for the sole purpose of giving notice of the copyright claimed for the magazines; that is, it secured the magazine copyright to the publishers, and cannot be availed of as protection for Mrs. Stowe's story.

The answer to that is, that if the notice in the book had been in the name of the publishers, it would certainly not have been necessary in the subsequent publication in the magazine to have given two notices in identically the same form, one for the story and one for the magazine as a whole. The statute does not in terms call for such exactness, and there is no reason why such a provision should be implied through judicial interpretation.

A further answer is that there is no such thing as a magazine copyright. The notice in the magazine simply called attention to the fact that copyright was claimed for the entire contents of the magazine, but it did not pretend to indicate, nor was it called on to indicate, the time when the steps for securing copyright had been taken, other than that they were all taken within the limits of the year 1859.

The notice in the magazine called public attention to the fact that the entire contents were *protected* by copyright. So far as "The Minister's Wooing" was concerned, it notified the public that the publishers were acting in behalf of the author in protecting her rights while publishing as a serial the story she had already published in book form, just as they were acting for each and every other contributor.

As to "The Professor," counsel must concede that if the book had contained the notice in the form in which it appeared in the magazine, the statute would have been complied with literally and exactly. What, then, becomes of the claim that the notice in the magazine was a notice of a magazine copyright and could not be availed of for Dr. Holmes' work? Such literalness would mean a separate copyright notice for every article in the magazine. As we have pointed out, however, the term "magazine copyright" is both misleading and inaccurate. There is no patent right, as a whole, for the particular combination composing the magazine. The literary property therein is secured to the authors or proprietors, as the case may be, and while there may be technical questions as to the names in which suits for infringement may be brought, such questions cannot affect the ownership of the literary material for which protection is sought. So far as the "Professor" was concerned, there was no magazine copyright as distinguished from the book copyright. Dr. Holmes' right to protection had, or had not, been secured, and that is all there is to it. When the work appeared in book form the only question was whether the protection so secured was lost or not. Our contention is that the change of name from agent to principal was an immaterial variance, because it gave no opportunity for any one to be misled, and no one has been, in fact, misled.

2. The relation between author and publisher is so close as to constitute such an identity of interest that notice in the name of the publisher is equivalent to notice in the name of the author.

There is a peculiar force in the contention that the relation between author and publisher is so close that notice in the name of the latter is a notice of his author's rights.

The relation is that of principal and agent. The publisher spreads the author's thought in tangible form before the public. He is answerable to the author for his own personal conduct. Any discredit to him discredits the author also. The publisher is

the herald who announces, proclaims, and makes public the author's work. The relation is in the highest degree personal. It is non-assignable except by consent of the author.

Hole *v.* Bradbury, L. R. 12 Ch. D. 886, 897.
Stevens *v.* Benning, 1 K. & J. 168, 174.

In both of these cases, the court held that an author could interfere to prevent assignees of the publishing firm with whom he had contracted from continuing to publish a book without the author's consent.

This peculiarly personal relation between publisher and author was ably argued by Sir Walter Scott in a case involving his own interests. He says: —

"In no profession under heaven are there so many and such singular shades of gradation as among booksellers, or, as they are more properly called, publishers; and the question with respect to selecting a publisher is one of the most important which can occur to a man of letters in the course of his career. The circumstances tending to influence such a choice are as various as important. There are men in the trade the respectability of whose names would accredit works of a very dubious tendency, and there are such as would discredit the 'Whole Duty of Man.'

"There are publishers whose imprint would sell to a certain extent the most paltry catchpenny that ever came from Grub Street, and there are others upon whose shelves and counters the most popular work would become stationary.

"The connection of the booksellers with the works of periodical criticism will affect a work bearing their imprint, favorably or otherwise. Their place of residence is a consideration not to be despised. The branches of learning in which they have particularly dealt may recommend them or otherwise. In short, not even in the amount of his copy-money has an author such deep interest as in the choice of the person on whose exertions as a publisher the success of his labors must in a great measure depend. His choice, therefore, rests on a distinct *dilectus personæ*, and therefore must be construed as attaching personally to the publisher agreed upon a faculty which he is to exercise in person, and which he cannot in justice be permitted to endorse away to another." ("Reminiscences of Sir Walter Scott," by John Gibson, p. 28, in Library of Boston Athenæum.)

This reasoning was adopted by the court to which it was addressed, and has received the express approval of Lord Abinger, who says: "I must own his [Sir Walter Scott's] reasoning appeared satisfactory to me."

Gibson *v.* Carruthers, 8 M. & W. 343.

There is, we submit therefore, that identity of interest between the two that renders a copyright notice in the name of either, a sufficient and substantial compliance with the Act, in order to secure to the author the fruits of his genius.

3. The law secures copyright to the author alone, and it belongs to him, although registered in the name of his publisher.

The Constitution of the United States, Article I, Section 8, gave Congress power to secure to *authors* the exclusive right to their writings. The history of copyright legislation in this country before the adoption of the Constitution shows that such legislation was of a general character "for the purpose of securing a natural right to the fruits of mental labor," while patents were granted by special acts of legislation in each case.

> Curtis' Const. Hist. of the U. S., Vol. I, p. 532.
> Curtis on Copyright, pp. 77–79.

Neither the Constitution of the United States (Art. I, § 8) nor the various statutes have ever contemplated or permitted copyright in any one but the *author* or his assignee. There is no warrant in either Constitution or statute for a publisher, *qua* publisher, taking out a copyright, and, if the statute is to be literally construed, the many thousand copyrights which have been taken out in the names of publishers are void and valueless. It has been for years a general custom for the publisher to take the necessary steps in his own name to secure copyright on the work intrusted to him to publish. If, however, the courts cannot say that in doing this he has acted for the author and the author's benefit as his agent, no copyright has been secured, and the fruits of the author's labors have been wholly lost.

The first Copyright Act (May 31, 1790) carefully limits this right to multiply copies to authors and their "assigns who have purchased or legally acquired the copyright." The Act of 1802 speaks of "the author or proprietor," but nowhere is any right given to any one who is not the actual author or one who has acquired a proprietorship of the writing. The revision of 1831 struck out the word "proprietor" and limited the right to the "author and assigns."

The statutes of the various states were all clearly drawn in the interest of the author and to secure his rights. The original propositions to the Constitutional Convention by Messrs. Madison

and Pinckney which were the foundation upon which the clause of the Constitution rests, referred to authors alone.

2 Morgan, Law of Lit., 146, 147.

Our contention on this point is none other than is contained in the plain words of every statute that has ever been enacted, — that copyright — this privilege or right of multiplying copies — is reserved to the author alone, and enures to him alone unless, and until, he has formally parted with it to another. The result, then, is that if the statute is to be literally and strictly construed, no copyright was secured on the last instalment of "The Professor" in the December number of the *Atlantic Monthly*, although all the statutory formalities were complied with, because they were not done by the author and in his name. For the same reason, no copyright has ever been secured by the publishers of a magazine on any literary work published therein, and not owned absolutely by them, unless the steps to secure copyright on each work were taken independently in the name of the author. The court will take judicial notice of the almost universal custom of publishers for many years to copyright, in their own names, books intrusted to them for publication. On the contention of the appellees, these copyrights are all wholly void; the author has not taken advantage of the statute personally, and the publisher was given no right by the statute, and consequently acquired none, either for himself or the author, by the steps taken. There can be no escape from this conclusion on any literal interpretation of the statute. The law nowhere recognizes copyright in a publisher not the owner of the copyrighted work.

As to the "Professor," the appellees claim that the copyright obtained on the instalment of the story published in the December number was lost because the notice of copyright which subsequently appeared in the book was not the same as that printed in the magazine. It is true that the notices differed, in that the magazine notice was in the name of the publishers, while the book notice was in the name of the author. It appears from the Record (p. 3) that the publishers of the *Atlantic Monthly* had merely the privilege to publish "The Professor at the Breakfast Table" in serial form. The copyright, except for this limited purpose, was clearly in the author, and it was the clear duty of the publishers to secure copyright so that the rights of the author would be protected as well as their own. They were acting as his agents and for his benefit. Such copyright as they secured

was held by them under the terms of the contract and *in trust* for Dr. Holmes.

Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764.
Pulte *v.* Derby, 5 McLean 328, 335.
Lawrence *v.* Dana, 4 Cliff. 1.
Drone on Copyright, pp. 260, 368.

Except for the matter of formal proof of registration, there is no reason why the court should not hold that copyright flows in all cases directly to the author or his assignee. The object of the statute was to protect *authors*, and any theory that a legal title to a copyright is vested in the person in whose name the registration is made is based on a fiction, and on a mistaken notion of the effect of the required registration. The copyright is vested by the statute and the Constitution in the *author* and in no one else, except by his consent. If, for example, registration is made in the name of a publisher, either with or without the author's consent, the copyright is none the less vested in the author. It has been held that in such case an action for infringement may be brought in the name of the author; and in any case, the publisher would have no power to prevent an action in his name.

Lawrence *v.* Dana, *ubi supra*.

4. Where copyright is registered in the publisher's name, the courts treat the author as the real owner, and allow suits by him for protection of his copyright.

The courts have apparently been frequently misled in considering the question of copyright by the analogy of patents, and have frequently treated copyright as an incorporeal right analogous to a patent. As we have before insisted, the statute does no more than to secure to the author rights of reproduction of the fruits of his genius, which, except for the statute, the courts would not protect him in after publication. In many cases, therefore, the courts have spoken of the legal title of the copyright as being in the person by whom the steps were taken to secure it and in whose name registration was had, although at the same time recognizing that the beneficial rights may be in another person, particularly if that person be the author. The courts have frequently recog ized the validity of a copyright taken out in the

publishers' name, by insisting that the change in the form did not vary the substance, and the copyright belonged to the author.

In Pulte *v.* Derby, 5 McLean, 328, the publishers had registered the copyright in their own names under a contract allowing them to publish two editions. The author filed a bill to restrain the publication of a third edition. The court said: "Although the legal title to the copyright is in the defendants, I can only consider it in them for the purposes of the contract. The right covers their interest and protects it so long as they shall be engaged in the publication and sale of the work. *Beyond this, they are not considered as having the right. They cannot transfer it. They have no power to assign the copyright; nor to publish the work except upon the terms of the contract.*"

He goes on to say: "When the agreement was entered into, the complainant (author) had no right to convey. He had a right to his manuscript, which the statute protects, and the property in which would be protected at Common Law. The right to publish this manuscript, which was all the complainant could give, was provided for in the agreement. It was the interest of both parties to have the copyright secured. Without this, the first publication of it would have abandoned it to the public, and consequently it could have been of no more value to either party than to any other publishers or authors who might choose to revise and republish it. The defendants, it appears, secured to themselves the copyright, and the evidence of that right was published on the second page of the book, which was under the eye of the complainant. *He, therefore, sanctioned it.*"

It is clear under the statutes that this "*sanction*" by the author did not vest the copyright in the publishers. The court recognizes that in saying that beyond their contract right "they are not considered as having the right." Judge McLean agrees with Judge Clifford and Judge Lowell in Lawrence *v.* Dana, in holding that the author owns his copyright, even though he has permitted it to be registered in the name of his publisher. How absurd, therefore, to say that he loses the copyright thus secured by giving notice thereof in his *own name.*

In

Scribner *v.* Clark, 50 Fed. Rep. 473,

Judge Blodgett said in speaking of a copyright taken in the name of the publishers, "as the proof shows that Mrs. Terhune settled from time to time with the owners of the copyright for her royalties, the court will presume that *her legal title as author of these books* was in some due and proper manner conveyed to and vested

in the persons who secured the copyright thereof," and this language was quoted by Mr. Justice Blatchford in this court as "a sound view," in

Belford *v.* Scribner, 144 U. S., 488 at p. 504.

In

Lawrence *v.* Dana, 4 Cliff. 1,

the copyright was registered in the name of Mrs. Wheaton, the owner of the text upon which Mr. Lawrence made his annotations; but it appearing that Mr. Lawrence was the real author of the work claimed to be infringed, he was allowed to file a bill in his own name to protect his copyright. It is true that Mrs. Wheaton's representative was made a party defendant, but it does not appear that the bill had any allegation that she had been applied to for permission that suit should be brought in her name, or that the court thought that any such request was necessary, or such permission material. Judge Clifford said that Mrs. Wheaton "acquired therewith the right to copyright the same for the protection of the property, but she did not acquire thereby any right or title, legal or equitable, to use the notes in a third edition of the work without the consent of the complainant."

He goes on to say: —

"Beyond controversy she took it out by the *consent* of the complainant (Lawrence), and it is equally clear, in the judgment of the court, that she took it out in *trust for the complainant* when her property in the notes should cease." Mrs. Wheaton had the right, under her arrangement with Mr. Lawrence, to make a limited use of his notes in certain editions of her husband's work on international law; but, although taking out the copyright in her name, she had, as the court puts it, no "*right or title, legal or equitable*, to use the notes" for any other purpose.

Although the court here uses the word "trust" to express the relation between Mrs. Wheaton and Mr. Lawrence, it is clear that it means no more than agency. Mrs. Wheaton's position in regard to the copyright was an agency coupled with an interest, but the *real ownership* of the copyright was in Mr. Lawrence, and in him alone. It could not be in any one else under the statute, and the court here sustained a copyright in the face of the plain words of the statute, if the literal construction contended for by the appellees is to be adopted. There was no warrant whatever in the statute, under this view, for any copyright in Mrs. Wheaton. She was neither author nor an assign. This argument was strongly

made by counsel in the case. The point taken went to the root of the whole case, but the court declined to accept so narrow a view.

This case is on all fours with those at bar. Ticknor & Fields had but a right of serial publication. The copyright belonged to the authors, and whatever Ticknor & Fields did in their names with reference to the works in question was wholly for the benefit of the authors. It matters not whether you call it "trust" or agency; it is all one.

If then, the acts of Mrs. Wheaton were those of Mr. Lawrence, it certainly would have been true that, in publishing his notes as a separate work, Mr. Lawrence could have preserved *his* copyright, although secured for his benefit by Mrs. Wheaton and in her name, by giving notice of that copyright *in his own name*. It would be a narrow construction indeed to say that a man is entitled to secure *his* copyright in the name of some one else, and lose it by notifying the public that it *is* his. The step which the court is asked to take in this case has already been taken by the courts in thus upholding a copyright taken out in the name of some one other than the author. When they assert, as they do, that the copyright still *belongs* to the author, and not to the person in whose name it is taken out, they have gone as far as is requested in this case. We submit that the copyright must always be "taken out" by the *author* to be valid, and if that is done, in reality, it makes no difference that the steps were taken by his agent, or that the agent's name appears at some time in the copyright notice. Such name has no warrant in law in such notice, except as a substitute for, and representative of, the name of the author.

It has been held in England that the court would enjoin a pirate from setting up in an action at law that the plaintiff did not have the legal title to the copyright when there was a real interest to be protected and the legal holder refused to allow suit in his name.

Sweet *v.* Cater, 11 Sim. 572.

In Bohn *v.* Bogue, 10 Jur. 420, the Vice-Chancellor said: —

"This court always takes notice of the equitable interest, and if the equitable title to the copyright is complete, this court will take care that the real question shall be tried, notwithstanding there may be a defect in respect of the legal property."

See, also,

Chappell *v.* Purday, 4 Y. & C. 485.

If, then, the courts are accustomed to consider the copyright in the author, without regard to the name in which it is registered, the form of registration is immaterial so long as the information called for by the statute is given. "A, B" in the fifth clause of the Act of 1831, therefore, should be construed to mean the author *or* his duly authorized representative, and the statute is substantially satisfied if the name appearing in the notice is of either. So long as the public get the information to which they are entitled, no one has a right to complain, and all the statute requires is the name of some duly authorized person to whom application can be made. The mere fact that application may be made to two persons is immaterial so long as they represent the same interest. If Emil Werckmeister, who registered his copyright in the name of the "Photographische Gesellschaft," should change his notice so as to have it in his own, instead of his trade, name, it can hardly be doubted that the copyright would be still valid, even though some copies of his work might bear the notice in one form, and some in the other. Ticknor & Fields were, so far as the publication of "The Professor at the Breakfast Table" was concerned, a trade name for the author. They published the story in magazine form; they were also the publishers of the book. So far as the public was concerned, Ticknor & Fields were Dr. Holmes, and Dr. Holmes was Ticknor & Fields; for all practical purposes the names were interchangeable. If Mrs. Stowe, for example, had written her book when she was "Harriet Beecher," and notice had been given in that name, she certainly would have been entitled to print a notice in the name of "H. B. Stowe" after her marriage. Mrs. Terhune could clearly have substituted her own name for that of her *nom-de-plume* "Marian Harland" without invalidating her notice.

Scribner *v.* Clark, 50 Fed. Rep. 473.

"Mark Twain" may use his own name in the notice in his books. So, if a name has been changed by proper authority, the new name would be properly printed in the notices after such change. Therefore mere literal repetition of the name in which entry was originally made is not essential. It is true that the change of name to that of an entire stranger to the copyright would not be a compliance with the statute, but our contention does not extend that far. There must be some identity of interest in the names, but within that limit a change of name in the notice should not destroy copyright.

5. A magazine copyright, so-called, is distributive and secures to each contributor the right to his own work and to republish it and give notice in his own name.

When the publishers register a magazine for copyright, such right, when secured, is, and must be, distributive, and each author who has permitted publication of his work in a given issue of a magazine is secured in his right to multiply copies of his work in any other form permitted by his contract. It is making too literal an interpretation of the statute to say that when he cuts loose from the magazine and publishes his book in separate form, he is obliged to use the name of the publisher of the magazine in order to give notice of his *own* copyright. That right is either held in trust for the author by the publisher, or, under the wording of Act of 1831, accrues directly to the author. Which of these two views is the correct one is immaterial here, for equity looks through the form of the transaction, and in construing the statute and the interpretation to be given to the letters "A, B" in the fifth section, this court will make such interpretation as will best subserve the interests of the author.

A magazine copyright is *distributive*, and "secures," to use the language of the Constitution of the United States, to each author publishing his work in the magazine his copyright. Whatever rights the publishers secure by entry in their own names are, except for the protection of their own interests in the copyright under the publishing agreement, held for the benefit of the respective authors contributing to the volume. By complying with the terms of the statute, the publishers secure to each *author* copyright on his work appearing therein. The publisher may by his contract have a limited interest therein, but it none the less is the sole property of the author to whom alone the constitution and the statute *secure* the right. That right in such case may be enforced directly by the author without the intervention of the publisher even in name.

Lawrence *v.* Dana, *ubi supra.*

Twenty contributors to a magazine which has been duly entered for copyright by the publishers may each protect his right. We beg to repeat that it should be borne in mind throughout this discussion that copyright belongs to the author until he parts with it, and it belongs to him none the less because the steps required by the statute to secure it have been taken in the *name* of his publisher.

6. Even if the magazine notice is construed to refer only to the magazine, and the book notice to the book, as contended by appellees, the copyrights relied on are nevertheless valid.

Our statutes in substance prescribe that before publication the author shall give notice, by depositing his title, that he does not intend to dedicate his work to the public; next, that he shall deposit copies of his work for the purpose, among other things, of identifying it; and finally, that he shall give continuing notice in the work itself that he has complied with the law. All these things have been done in the cases at bar, by parties authorized to do it, and *done twice*, and the question is whether the two attempts to "secure" property defeat each other. The appellees' contention is that they do. In the case of Mrs. Stowe's book, they say that the notice in the subsequent magazine publication is a notice of the magazine copyright only, and cannot be held to refer to her book copyright; in the case of Dr. Holmes' book, that the notice in the book is of the book copyright and cannot be held to refer to the magazine copyright on the last chapters. Double compliance with the statute, it is claimed, is a two-edged sword cutting both ways.

The injustice of this contention is manifest in "The Minister's Wooing"; for the appellees, copying from the magazine, are notified on the titlepage that it is copyrighted. Their only defence against the copyright so asserted is the prior publication in book form. But that prior publication cannot be found *without also finding the notice of book copyright.* So far from being misled, the reprinter cannot find a loophole of escape without finding also a valid copyright. The same is true of "The Professor." The appellee admits that he copied "word for word" from the magazine publication, and must have had notice of valid copyright before his eyes. He cannot find the alleged defective notice in the book without becoming aware that, beside the effort the publisher made to protect the work, the author has also sought to do the same for the completed work.

So the question, taking the appellees' standpoint, as to the limited effect of the notices, is this: *When two efforts to "secure" a literary work have been made, either of which would be valid unless destroyed by the other, are both invalid?* No case has decided anything of the kind. All the cases have dealt with a single compliance with the statute, notice of some part of which compliance has been wholly omitted. There is nothing in the statute which

prohibits "securing" literary property twice. If the certificate of the Librarian of Congress was a grant of a right of property, a subsequent grant of the same right to the same property would be ineffectual and perhaps a nullity. But it is not. The second certificate is merely an evidence that the author has again declared his intention not to dedicate his work to the public; that he has again complied with the statutory requirements for "securing" to himself the work of his brain. And so of the *notice* of the second compliance. It is a reassertion of the intention not to dedicate, and not a defective notice of the original assertion.

Can it be that a second declaration of an intention to retain property, and continuing notice of such declaration, are a dedication of that property to the world? Much the broader and fairer view is that repeated performances of statutory requirements confirm each other. The defence that notice has been given in some instance of some other compliance with the statute answers itself. It is a notice of an independently valid and effectual compliance with the statute, and again "secures" the right of property already existing in the author.

This is the point on which the Court of Appeals seems largely to have decided the cases. The court says (Rec. No. 267, p. 19), "In the volumes published by Dr. Holmes no notice was given, or intended to be given, of the copyright taken out by Ticknor & Fields." This may well be true, but the *intention* with which a notice is given is of no importance. In Holmes *v.* Hurst this court said it made no difference what Dr. Holmes' intentions were in his serial publication, it was what he did. We adopt that view in reply to the court below. If Dr. Holmes' notice is a notice that his work had not been dedicated to the public, but that his rights therein had been "secured," it makes no difference whether he meant that he had secured them, or meant that his publishers had secured them for him.

The court goes on to say (Rec. No. 267, p. 15), "There cannot be two successive copyrights on the same publication." We agree that an author cannot, by entering his work a second time, extend the copyright period. The courts will certainly hold him to the date of his original entry; but if, by some accident or mistake, or for greater caution, he, or his agent, enter it twice or several times, will it be said that the notices accompanying the publication under each entry can refer only to that "entry," and the copyright is bad because there is no notice of the original entry? Suppose, by arrangement, a work is issued in New York, Chicago and San

Francisco by different publishers, and each for safety sends on the title page and two copies, and gives notice in his own name, will the copyright be lost because two of the notices do not apply to the one which reached Washington first? The common practice to-day of syndicating important articles and publishing them in a newspaper in each of the important cities is an illustration of the severity — the unnecessary severity — with which such a rule would work. Many of the newspapers are entered for copyright, and each notice, except the one first received, would, under this contention, be held no notice because it referred to a different entry from the first one.

We submit that there is often a misapprehension of the word "copyright." In some cases the word is used as if the receipt which the Librarian of Congress issues on the deposit of a title and two copies was itself property or conveyed property. It is used as if it was a grant of a monopoly by the sovereign as Letters Patent are. The receipt is nothing but a memorandum that two of the required steps for "securing" copyright have been taken. The copyright itself inhered in, and belonged to, the author unless, and until, he gives it away by publication without entry, deposit and notice; unless, in other words, he dedicates it to the public.

It is to be observed that we are not dealing with the question of a copyright notice which gives an earlier year than the true one. There a new element comes in, and the notice is bad because it is misleading and claims too much. These notices are all of the year 1859. The statute has carefully refrained from requiring the month and day to be set out in the notice. If the omission in the statute was not intended to cover exactly such cases as these, it admirably accomplishes that result. When a general notice of the year is correctly given nothing more is required, leaving the expiration day to be determined by an examination of the entry, and, if there are several, by the date of the earliest one.

(c) The statutory protection of literary property is a compensation given by the public to the author for dedicating his work to the public, and the public faith is pledged to secure him in his rights.

It is now so well settled that citation of authorities is unnecessary, that the basis of literary property is the intellectual labor necessary to its production.

Bleistein *v.* Donaldson Lith. Co., Decision in this Court, Feb. 2, 1903.
Walter *v.* Lane (1900), A. C. 539.
Henderson *v.* Tompkins, 60 Fed. Rep. 758.
Brightley *v.* Littleton, 37 Fed. Rep. 103.
Carlisle *v.* Colusa County, 57 Fed. Rep. 979.
Drury *v.* Ewing, Fed. Cas. No. 4095.

It is always enough to show that a book is in literary form, and is the result of intellectual labor. This is the basis for supporting the right of literary property in compilations, directories, telegraph codes, etc. There has never been any question that the courts will fully protect the owner's rights in a manuscript, and the most serious question before the courts in regard to the protection of literary property has been as to the effect upon such property of publication to the world. It is now elementary law that publication is a dedication to the public except in so far as the legislature steps in to preserve and secure to the author what he would otherwise lose on publication. The statute neither creates nor adds to the author's property in his literary work. It simply gives a method of protecting him in its enjoyment during such term as may be granted to him by the legislature. The courts have many times said, in discussing the provision in the Constitution of the United States granting Congress power to promote the progress of science and the useful arts (Art. 1, Sec. 8), that it gives Congress the power to enter into a contract with the author or inventor by offering compensation to him for the time and labor devoted, through an exclusive right for a limited time.

Grant *v.* Raymond, 6 Pet. 218.

While it was said, *obiter*, in the majority opinion in

Wheaton *v.* Peters, 8 Pet. 591.

that the statute created a new right, that is entirely true in the sense in which it was probably intended by the Justice delivering the opinion. As was pointed out in that case, and has been repeatedly said by this court, there is no common law of the whole United States under which literary property could be supported. The common law in this country was brought by the colonists to each colony, so that so far as the United States were concerned this statute did create a new right by giving to the author rights

throughout the entire country, which, except for this provision of the Constitution, he would have had to seek, as before the Constitution, by statutes from each of the separate states.

Curtis on Copyright, p. 80.

The doctrine of Grant v. Raymond fully applies to this case.

We would call especial attention to the instructive opinion of Chief Justice Marshall in

Grant *v.* Raymond, *supra*,

where he discusses at length the relation between the Government and the patentee, and as a patentee's and author's rights are derived from the same clause of the Constitution, the views of the Chief Justice apply with equal force to the relation between the Government and the author.

In that case a patent had been issued with defective specifications so that it did not cover the machine as invented and constructed. The Secretary of State reissued the patent with corrected specifications, and the question arose whether this could be done, or whether the patentee was not bound by his first specifications. The court took the broadest possible ground, and decided that such reissue might be made when the original defect arose from inadvertence or mistake and without any fraud or misconduct on the part of the patentee. The Chief Justice goes on to say: —

"To promote the progress of useful arts, is the interest and policy of every enlightened government. It entered into the views of the framers of the Constitution, and the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries' is among those expressly given to Congress."

In referring to the patent (and the language is entirely applicable to a copyright) he says (the italics are ours):—

"It is the reward stipulated for the advantages derived by the public from the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to *execute the contract fairly* on the part of the United States, where the full benefit has been actually received; if this can be done without transcending

the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time *the public faith is pledged*. That sense of justice and of right which all feel, pleads strongly against depriving the inventor of the compensation thus solemnly promised, because he has committed *an inadvertent or innocent mistake*."

Further on in the opinion he says: —

"The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensation made to those individuals for the time and labor devoted to these discoveries, by the exclusive right to make, use and sell the things discovered for a limited time. That which gives complete effect to this object and intention, by employing the same means for the correction of inadvertent error, which are directed in the first instance, cannot, we think, be a departure from the spirit and character of the act";

and, later,

"The communication of the discovery to the public has been made in pursuance of law, with the intent to exercise a privilege which is the consideration paid by the public for the future use of the machine. If, by an innocent mistake, the instrument introduced to secure this privilege fails in its object, the public ought not to avail itself of this mistake, and to appropriate the discovery without paying the stipulated consideration. The attempt would be disreputable in an individual, and a court of equity might interpose to restrain him."

See, also, the opinion of Hopkinson, J., in the Circuit Court in

Wheaton *v.* Peters, 8 Peters, Appendix II.

In

Kendall *v.* Winsor, 21 How. 322,

Daniel, J., points out that the remuneration of genius is a duty incumbent upon the public, and while inventors (and equally authors) are bound to diligence and fairness in their dealings with the public, they are by obligations equally strong entitled to protection against frauds or practices to pirate from them the result of their thought or invention.

The courts in England have been equally strong in referring to copyrights. Lord Hardwicke said, in

Gyles *v.* Wilcox, 2 Atk. 141,

"As to what has been said by Mr. Attorney-General of the act being a monopoly, and therefore ought to receive strict construction, I am quite of a different opinion, and that it ought to receive a liberal construction, for it is very far from being a monopoly, as it is intended to secure the property of books in the authors themselves, or the purchasers of the copy, as some recompense for their pains and labors in such works as may be of use to the learned world."

See, also, the remarks of Lord Cairns in

Maxwell *v.* Hogg, 2 Ch. App. 307 at p. 318.

In

Beckford *v.* Hood, 7 T. R. 620,

Lord Kenyon said, with reference to the case then before him, where the owner of the copyright failed to make proper registration thereof at Stationers' Hall: —

"All arguments in support of the rights of learned men in their works must ever be heard with great favor by men of liberal minds to whom they are addressed."

(*f*) *The history of the copyright idea in America shows the solicitude of the State for the author and his rights.*

The history of the copyright idea in America shows the solicitude of the legislatures for the protection of the author. Prior to the adoption of the Constitution twelve of the thirteen colonies had adopted copyright statutes.

Bulletin No. 3 of the Copyright Office.

Most of these laws were passed in pursuance to a recommendation of the Continental Congress to the several states, to secure to the "authors or publishers of any new books" copyright for a limited term. Connecticut, Massachusetts and Maryland passed acts prior to this resolution, and all have somewhat ornate preambles, setting forth the benefit to the state of the encouragement of literature and genius. The preamble of the Massachusetts Act is to be particularly commended to the attention of the court:

"Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of

human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences; as the principal encouragement, such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind: Therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind," etc.,— then the enacting clause provides that all books, etc., "shall be the sole property of the said author or authors."

A number of the statutes of the other states contain preambles of the same description, and practically every statute uses the word "secure." In North Carolina it was said:—

"Whereas, nothing is more strictly a man's own than the fruit of his study, and it is proper that men should be encouraged to pursue useful knowledge by the hope of reward, and as the security of literary property must greatly tend to encourage genius, to promote useful discoveries, and to the general extension of arts and commerce, etc."

And in Georgia it was provided that "such security may encourage men of learning and genius to publish their writings." And the same language is used in New York. The original copyright act of the first Congress was "An act for the encouragement of learning by securing copies, etc., during the times therein mentioned."

We submit, therefore, that it is not only the privilege, but the duty, of this court to construe the statute in question for the protection of the author so far as that can be done without acting in direct controvention to the express wording of the statute.

The origin of the provision for notice of copyright.

The provision of the statute requiring copyright notice in each copy of a book did not appear in the original Copyright Act of 1790. It first appeared in the Act of 1802,

Bulletin No. 3, p. 33,

and its origin may be traced to two sources. The original Copyright Act of 1790 extended only to a map, chart or book,

Bulletin No. 3, p. 30.

The Act of 1802 extended protection to the "arts of designing, engraving and etching, historical and other prints."

Bulletin No. 3, p. 32.

This portion of that act (Sects. 2, 3 and 4) was taken almost bodily from the Statute of 8 Geo. II, c. 13, which was the original English statute passed to protect engravings, twenty-five years after the passage of the original Copyright Act of 8 Anne, c. 19. See

Curtis on Copyright, App., p. 8.

The English act required, as does Sect. 2 of the United States Act of 1802, the engraving upon the plate of a copyright notice. This requirement of notice is, therefore, clearly traceable to the English Engraving Act, and the English decisions thereon may be referred to for its interpretation.

The first section of the Act of 1802, however, provided that the copy of the record in the office of the clerk of the District Court, where by the terms of the original Copyright Act the title of the book sought to be protected had to be recorded, must be inserted at full length on the title page, or on the page immediately following, if a book; or if a map or chart, in a short form the same as was to appear on engravings. This requirement of publication of the record was apparently taken from the Pennsylvania Statute of 1784, Sect. 6, as no trace of such a provision can be found elsewhere.

Bulletin No. 3, p. 19.

This clause was not in the original draft of the act as first ordered printed by the legislature, but seems to have been added by a committee to which the bill was referred.

Minutes of the First Session of the Eighth Gen. Ass. of Pa. for Nov. 26, 1783.

Pennsylvania, however, had at all times a friendly disposition towards the protection of literature, and the twelfth article of Penn's Frame of Government in 1682 provided that, —

"The government and provincial council shall erect and order all public schools, and encourage and reward the authors of useful sciences and laudable inventions in the said provinces and territories thereof."

2 Proud Hist. Pa., p. 11.

The Pennsylvania Act itself states that it was passed in conformity to the resolution of the Continental Congress.

(g) The history of the notice clause shows that its purpose is merely to prevent the ignorant from being misled to their harm.

The historical reason for this provision as to notice makes a strong argument against any literal interpretation of the statute. The Statute of Anne did not require any notice of copyright to be inserted in the printed work, but did require notice to the public by registration at Stationers' Hall, and Section 2 of that act gave as the reason therefor that "Whereas many persons may ***through ignorance offend*** against this act unless some provision be made whereby the property in every such book . . . may be ascertained."

Lord Kenyon confirms this view in

Beckford *v.* Hood, 7 Term Rep. 620,

where he says: "There was a reason for requiring entry to be made at Stationers' Hall. It was to serve as ***a notice and warning*** to the public, that they might not incur the forfeiture of penalties before enacted against such as pirated the works of others."

This language from the Statute of Anne was copied in the third section of the Maryland Act, provision being there made for registration with the clerk of the General Court.

Bulletin No. 3, p. 14.

The same is true of the South Carolina Act, registration being there required with the Secretary of State.

Bulletin No. 3, pp. 20, 21.

All of the states except Rhode Island and New Hampshire followed the English statute in requiring registration, and the provisions in the Acts of Congress for publication of the certificate of registration in a newspaper and, subsequently, for printing it in the work itself, seem to have been outgrowths of that solicitude for persons who "may through ignorance offend against the Act."

(h) The English decisions on their notice clause show that the name in a notice may be changed as

the proprietorship of the copyright changes, so long as the change is not misleading.

Taking up first the interpretation of this notice clause in the English Act and the reasons given for its existence, the court in

Sayer *v.* Dicey, 3 Wils. 60 (1770),

say that the reason for imprinting the date and name on the plate is "that any person may know when the proprietor's exclusive right ceases, and when, and against whom, he may be guilty of offending contrary to the statute."

Thompson *v.* Symonds, 5 T. R. 41 (1792), was an action on the case for pirating a print, and it appeared in evidence that the copyright had been sold and the copyright notice changed so as to appear in the name of the vendee instead of the original proprietor, and prints had been issued from the plate so changed. During the argument counsel contended that, —

"The conditions of inserting the date of the print and the name of the proprietor were imposed for the purpose of informing the public when the exclusive right of selling would expire, and who was the real proprietor at the time, in order that his consent might be obtained previous to any copy being taken. . . . The object of the act in requiring the date was to give information when the right will cease, not when it began, and if the date in this case had been altered, as well as the name, the public would have been *misled*. . . . When the right was transferred to the plaintiff it became necessary to insert his name instead of Bowyer's, in order that persons ***wishing to copy*** it might know whose consent to ask for that purpose."

It is important to note the emphasis laid by counsel on the purpose of the statute to prevent the public from being misled, as this word ***misled*** has been dwelt upon in construing our own copyright notice, both by this Court and on many occasions by the Circuit Courts.

Lord Kenyon, C. J., said : —

"It should seem that the reason for requiring the name and date to appear on the print was that they might convey some useful intelligence to the public. The date is of importance, that the public may know the period of the monopoly. The name of the proprietor should appear, in order that those who wish to copy it might know to whom to apply for consent. It seems therefore necessary that the date should remain, but that the *name of the proprietor should be altered as often as the property is changed.*"

Vice-Chancellor Malins took the same view of the requirement for registration at Stationers' Hall, and held that the proprietor at the time of registration, and not the original proprietor, should register.

Weldon *v.* Dicks, L. R. 10, Ch. Div. 247, at p. 253.

In the latest English case, Brittain *v.* Hanks, 18 Times L. R. 525, it is said: "The effect of [the Statute] is that the date must not b e***misleading.***"

In

Newton *v.* Cowie, 4 Bing. 234 (1827),

Best, C. J., speaking of this notice, said: —

"The words of the act are satisfied by the disclosure of the proprietor's name. This is a sufficient indication of the person who is to be applied to for *leave to copy the print;* coupled with the date, it shows how long the designer has had the monopoly, and fully accomplishes the two objects of the act."

In

Rock *v.* Lazarus, L. R. 15, Eq. 104 (1872),

the copyright notice had the name of "Rock & Co." as proprietors, the trade name for a partnership containing persons whose names were not Rock. Malins, V. C., in holding this notice sufficient, said: —

"I think that the trading name of the firm is a sufficient designation, inasmuch as it enables parties to know whom to apply to for information, and whom they must sue."

We submit, therefore, that under the English law the notice in this case, whether in the name of the publisher or of the author, gives all the information which the statute contemplated.

II.

Copyright can be secured for part of a work.

It is well settled that copyright can be secured for part of a work. This was determined in England with reference to another book of Dr. Holmes', "The Guardian Angel."

Low *v.* Ward, L. R. 6 Eq. 415.

In that case Dr. Holmes, while publishing his work serially in the *Atlantic Monthly*, went to Canada, after the whole of the story

had so appeared except the last six chapters, and took steps to obtain an English copyright on the whole book. This copyright was upheld as to the last six chapters, and an injunction issued "restraining defendants from printing or selling any copies containing the last six chapters of the work."

Vice-Chancellor Giffard said: —

"The only ground on which this motion was resisted was, that there could not be copyright as to a part of a work only. But there are numerous cases showing that where the parts of a work can be separated, there may be a copyright in any distinct part of it. I may instance the cases of the last canto of Lord Byron's 'Childe Harold,' 'Croker's Notes to Boswell's Life of Johnson,' and of particular articles in cyclopædias. There is no analogy in this respect between a patent and the case of copyright, as it matters not whether the copyright is for the entire work or for a part only. It was not, in my opinion, incumbent upon Professor Holmes to give notice of his intention to claim copyright in this country, and I see nothing to deprive plaintiffs of their right to an injunction as to the last six chapters of the work."

In Cary *v.* Longman, 1 East, 358, the complainant had made material additions to an old road book and sought to restrain an infringement of his copyright. Lord Kenyon said: —

"Certainly the plaintiff had no title on which he could found an action to that part of his book which he had taken from Mr. Patterson's; but it is as clear that he had a right to his own additions and alterations, many of which were very material and valuable; and the defendants are answerable at least for copying those parts in their book. . . . The courts of justice have been long laboring under an error, if an author have no copyright in any part of a work unless he have an exclusive right to the whole book. I remember it was thought otherwise in the case of Mr. Mason (Mason *v.* Murray). Several of Mr. Gray's poems had been for many years before published, which were collected by Mr. Mason, and published with the addition of several new poems; but though he had not a property in the whole book, yet the defendant having copied the whole, the Lord Chancellor granted an injunction against him as to the publication with the additional pieces. So Lord Hardwick in another case granted an injunction to restrain the defendants from printing Milton's 'Paradise Lost,' with Dr. Newton's Notes; although there was no doubt but that they were at liberty to have published the original work itself without the notes."

See, also,

Kipling *v.* Putnam, 120 Fed. Rep. 631.
Reid *v.* Maxwell, 2 Times L. R. 790 (Ct. of App.).

Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.
Harper *v.* Shoppell, 26 Fed. Rep. 519.
White *v.* Geroch, 2 B. & Ald. 298.
Drone on Copyright, 144–149.

In Lawrence *v.* Dana, 4 Cliff. 1, the new matter consisted of notes to an old work, and it was held that copyright was duly secured, although the copyright notice was in the usual form and purported to apply to the whole book.

It is evident that this must be so. The statute makes no provision for any variation in the form of the notice, and, in many cases, such a variation would be an impossibility, as, for instance, in case of a new edition of a dictionary where small changes may be scattered over every page, or in case of the revision of a legal text-book where the new matter may vary all the way from verbal changes or additions of citations to long and elaborate notes.

If the defendants mean to contend that these copyrights are invalid because the copyright notices preceded the entire work instead of the last chapters, and that the notices must be so placed as to call attention to the difference between the copyright and non-copyright matter, then they must also concede that such a rule would be impossible of application in a vast majority of cases where copyright and non-copyright matter are printed together. The fallacy of this contention is seen in its application to directories or compilations of non-copyright materials, or reports of judicial decisions, where it has always been held that the reporter's own work was copyrightable although the decisions themselves were not.

In Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618, it was held that the copyright on an atlas covered each individual map constituting the atlas.

It is to be noted that the copyright secured on the December number of the *Atlantic Monthly* covered each and every article in it. Under the contention of the appellees, however, the copyright claimed and secured by Ticknor & Fields did not, and could not, extend to any instalment of a continued story appearing in that issue unless copyright had been duly claimed and secured in all the preceding issues of the magazine containing any part of such story. If, for example, through some technical slip, the copyright had failed on the January number in which the first instalment of the story had appeared, under this contention the entire copyright on the work would be gone, even though none of the rest

of it had been written or even fully conceived in the author's mind.

The claim that the work is an entirety and copyright must include the whole of it in order to be valid is, in another form, the argument used by the distinguished counsel for Dr. Holmes in his effort to protect "The Autocrat of the Breakfast Table" in an earlier suit (Holmes *v.* Hurst, 174 U. S. 82). It was there contended that the copyright on the book as an entirety could be secured under the statute, even though the work had been previously published as a serial in a magazine. It would be hard indeed if the argument which could not save the author on his first book should now be held valid to defeat him on his second.

III.

There was no change of title, in the case of "The Professor."

The contention is made that although copyright on the last instalment of the "Professor" was duly secured, yet it has been lost because the whole work was subsequently published in book form under a different title from that under which copyright was secured. The copyright relied on was secured in connection with the other contents of the *Atlantic Monthly* for December, 1859, and the story was published in book form under its proper title, and the title given to it in the magazine.

It is submitted that this contention is not well founded. The statute nowhere provides that, after copyright is duly secured by entry, the author may not change the title of his work as often as he pleases without imparing the validity of his copyright. All that the statute required was that a printed copy of that title, and a copy of the book, should be deposited with the Clerk of the District Court before publication. This was done. Ticknor & Fields duly deposited the title of the December number of the *Atlantic Monthly* and also a copy of that number bearing that title, and copyright was thereby secured for the entire contents of that issue of the magazine.

There is no magic in a title. It is no more than a convenient method of identification, and is not in itself the subject of copyright. The copyright does not protect the title, because copyright is nothing more than the right to multiply copies of the author's work, and the title cannot be protected except as an appendage to the work it identifies. It is submitted that where protection has

been given to a title, it was not given under the copyright law, but under the general principles of equity to secure protection from unfair competition.

Every magazine is an illustration of the rule that the title has nothing necessarily to do with the contents, as the magazine title never changes, while its contents are always changing. There can be no copyright in a magazine title.

Osgood *v.* Allen, 1 Holmes, 185.

See, also,

Jollie *v.* Jaques, 1 Blatchf. 618.

If there were any substantial foundation for this objection, it might be urged that there is nothing in the language of the statute which prevents an author from changing the title between the time that he records it and the time that he deposits copies of the book.

Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764.

In this case Judge Townsend said: —

"Complainants' counsel insists that, even if the authors at first contemplated copyrighting their productions as a single volume, they might change their minds, and pursue the course which they did. No decisive authority is cited, sustaining either claim. It is easily seen that an author may find it to his advantage to change the title of his work between the time of his taking his first step toward obtaining a copyright and the actual publication of the book. I do not think that the courts should hold that such change of title renders a copyright invalid, unless compelled to do so, and I do not think they are so compelled."

The contention of the appellees on this point leads to the neces sary result that if an author publishes a story in a magazine and his copyright is duly secured by the entry for copyright of the issue, or issues, of the magazine containing it, he cannot publish it in separate book form except under the title of the magazine where it appeared. If, for example, the publishers of the *Atlantic Monthly* had duly entered for copyright each number during the year 1859, the author's copyright, because belonging to him under the terms of his contract with the publisher, would be unimpeachable, but he would be limited in the title of his book when published separately to

"*Atlantic Monthly numbers 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26,*"

these being the titles under which the issues of the magazine containing the serial were originally published and entered for copyright; and, under a literal interpretation of this extraordinary proposition, the words "*Atlantic Monthly*" would have to be repeated twelve times, once for each number. This title would be both misleading and absurd, because every other serial story republished from the same numbers must bear the same title. The title of the author's selection and the one with which the story was associated in the public mind could not, therefore, be used, except, perhaps, as a sub-title; and even then, under a literal construction of the statute, the variance caused thereby between the title as filed and the title as published would give a technical ground for an objection to the validity of the copyright.

The appellees must necessarily take the position either that no serial story copyrighted by the publishers with the magazine can ever be published separately, or that the magazine title must always be used, although it applies to different matter in every issue. The true answer to this contention is, however, that copyright was secured for the last instalment of "The Professor at the Breakfast Table," appearing in the December number of the *Atlantic Monthly*, for 1859, through a strict compliance with the terms of the statute. As has been said, the title of the copy of the December number deposited corresponded exactly with the title separately deposited, and copyright on the entire contents of that issue was thereby secured. When the necessary acts for the registration of the copyright have been done, the statute is silent as to the way in which the author reaps the benefit of the right so secured, so long as the required notice of copyright continues to be given. It makes no difference whether the work on which the copyright has been secured is published under the title under which it was claimed, or whether it is buried as an appendix to a work on a different subject, or whether the author gives a new title to each new edition. The copyright, having been once secured, exists during the full term allowed by law, irrespective of the title. President Walker's copyright on his work on the United States was not lost because he allowed it to be published as part of the contents of Volume XXIII of *The Encyclopædia Britannica* and under that title.

Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764.

It is to be noted that the title of the work as published in *book* form was identical with that given to it in the *serial* publication.

We submit, however, that there is nothing in this claim, for t reason that copyright on a magazine is *distributive*, because tak for the benefit of the several authors, and the title deposited serv no other purpose than to point to the various titles of the seve articles making up the contents of the magazine. The deposit the title of the magazine conformed to the letter of the law, but order to fulfill the true purpose of the statute, it must be taken including all the various sub-titles.

In Johnson *v.* Newnes, L. R. 3 Ch. 663, the plaintiff was author of a series of stories which he published serially and co righted under the general title of "Birds of the Night." One the series, with the sub-title "The Cabman's Story," was publish separately under the latter title, and the objection was made t the title as registered was not used. The court, however, h the variance immaterial.

IV.

Copyright was duly renewed by Dr. Holmes.

It is further objected that the copyright entered by Tickno Fields, on the *Atlantic Monthly* for December, 1859, expired in 18 and was not renewed. It is true that Ticknor & Fields ne renewed any copyright on this issue of the magazine, but reason is that they, so far at least as Dr. Holmes' work was c cerned, had no copyright to renew. These publishers had mer a limited right of serial publication, and their right was gover by their contract with the author. The statute gives the right renewal to "*the author*," if he be living, and to no one else (R Sts. U. S., § 4954: St. 1831, ch. 16, § 2). The publishers, th fore, had no right of renewal on Dr. Holmes' work, and Holmes had certainly no right to renew the copyright on *Atlantic Monthly* for December, 1859. The author took the pro steps for renewal, and the copyright was consequently d renewed. This must be considered as settled, not only under terms of the statute, but under the decisions.

Pierpont *v.* Fowle, 2 Wood & M. 23.

Certainly if the author had died during the original term of copyright, it cannot be questioned that the right of renewal wo have accrued to his widow or children to the exclusion of publishers.

SAMUEL J. ELDER,
EDMUND A. WHITMAN.
Solicitors, and of Counsel
Appellants.

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Supreme Court of the United States

October Term, 1902

Office Supreme Court U. S.
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Clerk.

No. 267

GEORGE H. MIFFLIN ET AL.
Appellants

vs.

BENJAMIN F. DUTTON ET AL.
Appellees

No. 268

GEORGE H. MIFFLIN ET AL.
Appellants

vs.

THE R. H. WHITE COMPANY
Appellees

BRIEF ON BEHALF OF THE APPELLEES

Evening Post Job Printing Office, New York.

Supreme Court of the United States.

No. 267.
GEORGE H. MIFFLIN *et al.*,
Complainants, Appellants,

vs.

BENJAMIN F. DUTTON *et al.*,
Defendants, Appellees.

No. 268.
GEORGE H. MIFFLIN *et al.*,
Complainants, Appellants,

vs.

THE R. H. WHITE COMPANY,
Defendant, Appellee.

BRIEF ON BEHALF OF THE APPELLEES.

Statement.

As these cases involve questions which are, to a large extent, identical, they will be discussed together. Each case is an appeal from the decree of the United States Circuit Court of Appeals for the First Circuit, affirming the decree of the United States Circuit Court for the District of Massachusetts, sustaining a demurrer to the bill of complaint for insufficiency, and dismissing the bill, with costs.

Each of these cases was a bill to protect an alleged copyright, the one in "The Minister's Wooing" and the other in "The Professor at the Breakfast Table."

SUBDIVISION A.

"The Minister's Wooing."

Harriet Beecher Stow was the authoress of this work (R.,* p. 2).

The appellants' claim to copyright protection for the work, or any part thereof, rests:

(1) Upon an alleged copyright by Mrs. Stowe of "The Minister's Wooing" (p. 4); and

(2) Upon alleged copyrights by Ticknor & Fields of the two numbers of the *Atlantic Monthly* for November and December, 1859 (10), containing *the last thirteen chapters* of "The Minister's Wooing" (2 and 3).

"The Minister's Wooing" consisted of 42 chapters (2), and was published in print by Phillips, Sampson & Co. and Ticknor & Fields at Boston, in and as part of thirteen successive numbers of the *Atlantic Monthly* for the months of December, 1858, to December, 1859, both inclusive (2 and 3), with the consent and authority of Mrs. Stowe, under a contract between her and said publishers (3 and 4).

Each of said thirteen numbers of the *Atlantic Monthly* was a bound volume of 128 printed pages, and consisted of a part of "The Minister's Wooing" and other literary compositions (3).

The first 29 chapters of "The Minister's Wooing" were published in the first eleven of said thirteen numbers of the *Atlantic Monthly*, prior to September 28, 1859 (2), and *without any attempt to secure a copyright.*

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* Under this subdivision the references are to the pages of the record of Mifflin v. Dutton.

Afterwards and on October 14, 1859, Mrs. Stowe entered "The Minister's Wooing" for copyright in *her own name* (4).

On October 15, 1859, Mrs. Stowe published the *whole* of "The Minister's Wooing" in separate book form (pp. 4 and 5).

Thereafter and between October 21 and November 23, 1859, the last 13 chapters of "The Minister's Wooing" were published in the two numbers of the *Atlantic Monthly* for November, 1859, and December, 1859 (pp. 2 and 3).

Said numbers of the *Atlantic Monthly* for November and December, 1859, gave no information of copyright by *Harriet Beecher Stowe*. The only notice of copyright given in those numbers was the following notice on the page succeeding the title page: "Entered according to Act of Congress in the year 1859 by *Ticknor & Fields* in the Clerk's office of the District Court of Massachusetts," and the following notice on the page of each number where the part of "The Minister's Wooing," therein published began: "Copyright secured by the author in *Great Britain* and *France*" (5).

Said numbers of the *Atlantic Monthly* for November and December, 1859, were entered for copyright by Ticknor & Fields (10) but *after* Mrs. Stowe had published the *whole* of "The Minister's Wooing" in book form (10).

In 1887 Mrs. Stowe deposited the title of "The Minister's Wooing" a second time and took the other steps prescribed by the statute for renewing a copyright (5).

In 1896 Mrs. Stowe assigned to complainants her claim to copyright in "The Minister's Wooing" (5).

The defendants are charged with having sold since October 1, 1899, copies of "The Minister's Wooing," copied from said thirteen numbers of the *Atlantic Monthly* and which were exact copies, word for word, of "The Minister's Wooing" published in the aforesaid numbers of the *Atlantic Monthly*, without any other matter (5 and 6).

POINTS.

I.

It is "the settled law of this country that the right of an author to a monopoly of his publications is measured and determined by the copyright act."

Holmes *vs.* Hurst, 174 U. S., 82, 85.

"The right of action as well as the copyright itself is wholly statutory, and *the means of securing any right of action are only those prescribed by Congress.*"

Thompson *vs.* Hubbard, 131 U. S., 123, 151.

II.

These cases arise under the act of 1831 (Ch. 16, 4 Stat. at L., 436), and the conditions precedent to the perfection of a copyright under that act were:

(1) The deposit "before publication" of a printed copy of the title of the book (Sec. 4);

(2) The delivery to the prescribed clerk of a copy of the book within the prescribed time (*Ib.*);

(3) The insertion of notice of copyright in the prescribed form in all published copies (Sec. 5).

Thompson *vs.* Hubbard, 131 U. S., 123, 150.

III.

The two copyrights which were entered by Ticknor & Fields on the November and December, 1859, numbers of the *Atlantic Monthly* (10) were clearly

invalid, so far as they related to the part of "The Minister's Wooing" therein published, because both of those copyrights were entered *after* publication of the *whole* of "The Minister's Wooing" by Harriet Beecher Stowe in book form (10).

Holmes *vs.* Hurst, 174 U. S., 82.

Moreover, these magazine copyrights expired in 1887 and were not renewed.

IV.

The copyright entered by Harriet Beecher Stowe on "The Minister's Wooing" was invalid.

(*A.*) As the first twenty-nine chapters of "The Minister's Wooing" were published in the *Atlantic Monthly* before Mrs. Stowe entered "The Minister's Wooing" for copyright (p. 4), she could not obtain copyright for those twenty-nine chapters, and to that extent her attempted copyright of "The Minister's Wooing" was invalid.

Holmes *v.* Hurst, 174 U. S., 82; affg. s. c., 51 U. S. App., 271; affg. s. c., 76 Fed. Rep., 757.

Hence by entering "The Minister's Wooing" for copyright Mrs. Stowe secured a valid copyright only on the then unpublished part of that work, to wit, the last thirteen chapters thereof.

(*B.*) The copyright entered by Harriet Beecher Stowe on "The Minister's Wooing"—originally valid *only as to the last thirteen chapters*—was *afterwards wholly invalidated* by her failing to insert the proper notice of her copyright in the November and December, 1859, numbers of the *Atlantic Monthly*, in which the last thirteen chapters of "The Minister's Wooing" were also published.

(*a.*) "The Minister's Wooing" was entered for copyright by *Harriet Beecher Stowe* in *her* name on October 14, 1859 (p. 4).

(*b.*) Thereafter the last thirteen chapters of "The Minister's Wooing" were published by Ticknor & Fields in the two numbers of the *Atlantic Monthly* for November, 1859, and December, 1859 (2 and 3), with the consent and authority of Mrs. Stowe and under a contract between her and the publishers (4), and thousands of copies of each of said two magazine numbers were sold to the public between October 21, 1859, and January 1, 1860 (3).

(*c.*) The bill expressly avers (p. 5) that the November and December, 1859, numbers of the *Atlantic Monthly* contained no notice of copyright except (1), on the page following the title page of each number, the words, "Entered according to Act of Congress in the year 1859 by *Ticknor & Fields* in the Clerk's office of the District Court of the District of Massachusetts"; and (2), on the page of each number on which the part of "The Minister's Wooing" therein published began, the words, "Copyright secured by the author in *Great Britain* and *France*."

These notices of copyright by Ticknor & Fields were proper notices of copyrights which had been actually entered by them on those two magazine numbers (p. 10), but they were ineffectual because those copyrights were invalid in respect of the last 13 chapters of "The Minister's Wooing," therein published, in consequence of the fact that those copyrights were entered *after Mrs. Stowe had published the entire work in book form* (Point III., *supra*).

Such notices were only notices of said invalid copyrights taken out by *Ticknor & Fields* on the two magazine numbers. They were not a compliance with the notice required by Section 5 of the

Act of 1831 of the independent copyright taken out by *Harriet Beecher Stowe* on "The Minister's Wooing," because the name of Harriet Beecher Stowe was *wholly* omitted from the notice.

Section 5 of the Copyright Act of 1831 (4 St. at L., 437) enacts as follows: "*No person shall be entitled to the benefit of this act* unless he shall give information of copyright being secured, by causing to be inserted in the several copies of each and every edition published during the term secured, on the title page or the page immediately following, if it be a book, * * * the following words, viz.: *Entered* according to Act of Congress in the year *by A. B.* in the Clerk's office of the District Court of (as the case may be)."

"This requirement of giving the prescribed notice has always been held, under all the statutes, to be one of the conditions precedent to the perfection of a copyright, the other two being the deposit before publication of the printed copy of the title and depositing in the proper office within the prescribed time of a copy or copies of the book" (Thompson *v.* Hubbard, 131 U. S., 123, 149; Drone Copyright, 264:

"While the Courts have been liberal in holding any form of notice sufficient which contains the *essentials* of 'name,' 'claim of exclusive right' and 'date when obtained' (Lithograph Co. *v.* Sarony, 111 U. S., 53; Bolles *v.* Outing Co., 23 C. C. A., 594), they have not yet sustained the sufficiency of a notice which *wholly* omits some one of these essentials."

Lacombe, *J.*, Hoertel *vs.* Tuch, 94 Fed. R., 844.

There can be no valid copyright if the name of the person taking out the copyright is *wholly* omitted from the notice.

Thomson *v.* Hubbard, 131 U. S., 123.

Osgood *v.* Aloe Ins. Co., 83 Fed. R., 470; s. c., 69 Fed. R., 291.

Higgins *vs.* Kueffel, 30 Fed. R., 627; affd., 140 U. S., 428.
7 Am. & Eng. Enc., 2d Ed., 557.
Jackson *v.* Walkie, 29 Fed. R., 15.
Baker *v.* Taylor, 2 Blatch., 82.

In discussing the statutory form of notice of copyright the appellants made in the courts below the extraordinary contention that notice of copyright by "Ticknor & Fields" was sufficient notice of copyright by Harriet B. Stowe, because "it is enough if the notice calls attention to the claim of copyright, the year in which the claim was made, and *some duly authorized person of whom inquiry could be made*," *i. e.*, for the omitted name of the person by whom the copyright was entered.

Under this novel contention if the name of the party entering the copyright may be omitted and "the name of some duly authorized person of whom inquiry can be made" may be regarded as an equivalent, then, by a parity of reasoning, the date and all the other essentials, mentioned in the statutory form of notice, may, likewise, be omitted from the notice, and the simple notice "For copyright information apply to John Doe (the authorized agent)" will be sufficient.

The vice of the appellant's argument consists in the *assumption that notice of the copyright, either actual or constructive, is the equivalent of the specific notice required by statute.* The sole question is, has the owner of the copyright performed the *statutory* condition precedent to his purely *statutory* copyright of giving the notice in the manner and form prescribed by the act? If he has not, Section 5 of the statute in express terms denies him his purely *statutory* right of action. This point was sharply presented in Thompson *vs.* Hubbard, 131 U. S., 123. In that case the suit was brought by Hubbard against Thompson. Thompson had entered a book for copyright (p. 145) and assigned the copyright to Hubbard (*Ib.*), and the latter thereafter published the book without stating in the notice of copyright

the name of the person by whom it was entered (pp. 148, 149). Thompson thereafter published the book and, on being sued by Hubbard, objected that the *omission of Thompson's name from the notice of entry invalidated the copyright*, and the Supreme Court so held. *Now, Thompson certainly had actual knowledge of the fact that the copyright had been entered by himself*, and on that ground Hubbard contended that the statutory notice was not necessary as to Thompson. The Court disposed of that contention as follows (p. 151): "The view is urged that the only object of the notice required by the statute is to give notice of the copyright to the public, and that as Thompson himself took the copyright and had vested the title to it in Hubbard, he has no right to infringe the copyright, although it may be invalid as to the rest of the world. But we are of opinion *that the failure of Hubbard to comply with the statute operated to prevent his right of action against Thompson from coming into existence.* This right of action, as well as the copyright itself, is *wholly statutory*, and *the means of securing any right of action in Hubbard are only those prescribed by Congress* (citing cases)" (see also Holmes *v.* Hurst, 174 U. S., 82, 85). In other words, there is no equivalent for the statutory form of notice, not even actual notice.

The form of copyright notice prescribed by the Fifth Section of the Copyright Act of 1831 does not admit of the construction that the words " A. B." include the name of a person " of whom inquiry could be made," as claimed by the appellants.

Section 4 of the act prescribes a form of record for each copyright entry, in the following words: " Be it remembered that on the day of , , *A. B.*, of the said district, *hath deposited in this office the title of a book* * * * *the right whereof he claims*, as author (or proprietor, as the case may be)."

Section 5 prescribes a form of notice of the record, as follows: " *Entered* according to Act of Congress

in the year , by *A. B.*, in the Clerk's office, in the District of ."

Who is meant by A. B.? Clearly he, and he only, by whom the book has been "entered" for copyright—*i. e.*, the *person appearing of record to have deposited the title in the Clerk's office.* It cannot mean any other person, because there is no provision or room in the statute for any other name.

"*The exact form of the notice is prescribed by law and no equivalent is provided for, nor is any room for an equivalent left*" (Wheeler, *J.*, in Higgins *vs.* Kueffel, 30 Fed. Rep., at p. 628). In Thompson *vs.* Hubbard, 131 U. S., at pages 148 and 149, the Court said: "One of the forms used by Hubbard did not state the year in which the copyright was entered, or *by whom it was entered;* while the other form mentioned the year but not the *name.* * * * It is very clear that Hubbard as proprietor of the copyright was bound to give the statutory notice in the several copies of every edition published by him and that he *did not do so.*"

SUBDIVISION B.

"The Professor at the Breakfast Table."

Oliver Wendell Holmes was the author of this work (R.,* p. 2).

The appellant's claim to copyright protection for this work or any part thereof rests:

(1) Upon an alleged copyright by Oliver Wendell Holmes of "The Professor at the Breakfast Table" (4 and 5); and

(2) Upon an alleged copyright by Ticknor & Fields, of the December, 1859, number of the

* Under this subdivision the references are to the pages of the record in Mifflin *vs.* R. H. White Co.

Atlantic Monthly, containing a *part* of "The Professor at the Breakfast Table" (4).

"The Professor at the Breakfast Table" consisted of 12 component parts (2), all of which were published during the year 1859, by Phillips, Sampson & Company, and Ticknor & Fields, at Boston, in and as part of twelve successive monthly numbers of the *Atlantic Monthly*, for the months of January, 1859, to December, 1859, both inclusive (2 and 3), with the consent and authority of Dr. Holmes, under a contract between him and said publishers (3 and 4).

Each of the twelve numbers of the *Atlantic Monthly* was a bound volume of about 128 printed pages, and consisted of a part of "The Professor at the Breakfast Table" and other literary compositions (3).

No copyright is alleged to have been entered on any of said twelve numbers of the Atlantic Monthly save that for December, 1859.

On November 17, 1859, Ticknor & Fields deposited in the name of "Ticknor & Fields" a printed copy of the title of the number of the *Atlantic Monthly* for December, 1859, to wit: "Number 26, *Atlantic Monthly*. Devoted to Literature, Art and Politics. December, 1859," in the office of the proper clerk before publication of that number (4). The clerk recorded said title and a copy of that number was duly deposited with the said clerk (4).

After the publication of *all* the parts of "The Professor at the Breakfast Table" in said twelve numbers of the *Atlantic Monthly* (4)—such publication having been completed prior to November 23, 1859 (2 and 3)—and on December 21, 1859, Oliver Wendell Holmes entered "The Professor at the Breakfast Table" for a copyright in his own name (4).

On December 22, 1859, and during many years thereafter, Ticknor & Fields, under an agreement with Oliver Wendel Holmes, published the whole of

"The Professor at the Breakfast Table" in separate book form (5).

No notice of copyright by *Ticknor & Fields* was inserted in any copy of "The Professor at the Breakfast Table," published in separate book form, the only notice of copyright given in those copies being a notice of copyright entry by "Oliver Wendell Holmes" (5).

The bill fails to allege a renewal of the copyright of the December, 1859, number of the *Atlantic Monthly*.

The bill alleges that in 1887 Oliver Wendell Holmes deposited a printed copy of the title of "The Professor at the Breakfast Table" a second time, and took the other steps prescribed by statute for renewing a copyright (5).

The defendant is charged solely with having sold since October 1, 1899, copies of "The Professor at the Breakfast Table," "all of which copies were copied by the defendant from said twelve numbers of the *Atlantic Monthly* and were exact copies, word for word, of said twelve parts of "The Professor at the Breakfast Table," which were printed and published in the aforesaid numbers of the *Atlantic Monthly*, and none of said copies contained any other or additional matter whatsoever, and that upon each and every copy of said book so sold by defendants a notice appeared on the title page stating that the same was reprinted from the original text as published in the *Atlantic Monthly* (6).

POINTS.

I.

The alleged copyright by Oliver Wendell Holmes on "The Professor at the Breakfast Table" was wholly invalid.

The bill states (4) that Dr. Holmes deposited the title of "The Professor at the Breakfast Table" for copyright *after* the publication of all the parts of said work entitled "The Professor at the Breakfast Table" in the said numbers of the *Atlantic Monthly*. Such publication in the *Atlantic Monthly* was completed prior to November 23, 1859 (2 and 3), and Dr. Holmes entered his work for copyright on December 21, 1859 (4).

The serial publication of "The Professor at the Breafast Table" in the *Atlantic Monthly*, prior to any step being taken by Dr. Holmes towards securing a copyright of that work, invalidated the copyright thereof subsequently entered by Dr. Holmes (Holmes *v.* Hurst, 174 U. S., 82; affirming s. c., 51 U. S. Appeals, 271; affirming s. c., 76 Fed. Rep., 757).

II.

The part of "The Professor at the Breakfast Table," published in the December, 1859, number of the *Atlantic Monthly* is not entitled to protection under the copyright of that number taken out by Ticknor & Fields, because Ticknor & Fields, under a contract with Dr. Holmes, afterwards published that part of "The Professor at the Breakfast Table" *without giving notice of the copyright entered by Ticknor & Fields.*

(*a.*) On December 22, 1859, and during many years afterwards, Ticknor & Fields, under an agreement with Dr. Holmes, published the whole of "The Professor at the Breakfast Table" in separate book form (p. 5) without giving any notice of the copyright entered by *Ticknor & Fields*. The bill (p. 5) expressly avers that in the several copies of every edition of "The Professor at the Breakfast Table" so published in separate book form, Oliver Wendell Holmes and Ticknor & Fields inserted no notice of

copyright except as follows: "Entered according to Act of Congress in the year 1859 by *Oliver Wendell Holmes* in the Clerk's office of the District Court of Massachusetts," except that after June, 1874, the notice was "Copyright 1859 by *Oliver Wendell Holmes.*" This notice was only notice of the copyright attempted to be entered by Oliver Wendell Holmes on "The Professor at the Breakfast Table," a copyright which was wholly invalid because entered after the publication of the entire contents of that work (Point I., *supra*). But this notice of copyright by "Oliver Wendell Holmes" was not a compliance with the notice required by § 5 of the Act of 1831, of the independent copyright entered by *Ticknor & Fields* on the magazine number, in that the name of Ticknor & Fields is *wholly* omitted from such notice, and it contains nothing to indicate that it was a notice of copyright taken out by Ticknor & Fields (Point IV. of brief on "The Minister's Wooing," *supra*, where the point is discussed at length).

(*b.*) Much was said in the appellant's brief in the Court below as to the interests, legal and equitable, of an author and his publishers, *inter sese*, in a copyright entered by the publishers in their own name; and it was there urged that the magazine copyright, entered by Ticknor & Fields, was held by them in trust for Dr. Holmes, and that "when the sale of the magazine was at an end and the publishers had no more than a nominal interest in the copyright, further notice in their names was calculated to mislead the public as to the real *ownership* of the copyright"; and, also, that "it would be a narrow construction to say that a man is entitled to secure his copyright in the name of some one else and to lose it by notifying the public that it is *his.*"

This contention of the appellants proceeds upon the misconception that the purpose of the statute in requiring notice of copyright is to give information of the name of the person by whom the copy-

right is *owned* and not the name of the person by whom it was "*entered.*" In other words, the contention is that if, after entering the copyright in their own names, Ticknor & Fields had assigned it to Dr. Holmes, a notice should thereafter untruly say that it was "entered" by Dr. Holmes, and that if he thereafter assigned it to John Doe the notice thereafter should again untruly state that the copyright was "entered" by John Doe, and so on. The mere statement of such a proposition contains its own refutation. Whatever the original or subsequent *ownership*, legal or equitable, of a statutory copyright, the fifth section of the Act of 1831 requires that information of copyright "being *secured*"—not *owned*—shall be given by stating the name of the person by whom it was "*entered*"—not *owned*—"in the several copies of each and every edition published *during the term secured.*" *That name is fixed by the record of entry and is unchangeable throughout the term.*

III.

The part of "The Professor at the Breakfast Table" published in the December, 1859, number of the *Atlantic Monthly*, is not entitled to copyright protection for the further reason that the copyright on that *magazine number* was never renewed.

All that the bill avers is that in June, 1887, Oliver Wendell Holmes recorded the title of "*The Professor at the Breakfast Table*" a second time; that a copy of that record was duly published, and that two copies of "The Professor at the Breakfast Table" were deposited with the Librarian (p. 5). These steps would have renewed the copyright of "The Professor at the Breakfast Table" entered by Oliver Wendell Holmes, had not that copyright been void *ab initio* by reason of the prior publication of

the entire work in the *Atlantic Monthly* (Point I., *supra*). *Where a copyright is originally invalid, no valid renewal can be secured* (Wheaton *v.* Peters, 8 Peters, 591, 654; Drone Copyright, 261). These steps, taken by Dr. Holmes, were wholly ineffectual to renew the copyright of the *magazine number*. U. S. R. S., § 4954, enacts that "The author * * * shall have the *same exclusive right* continued for the further term of fourteen years upon recording the *title* of the work * * * a *second* time, and complying with all other regulations in regard to original copyrights within six months before the expiration of the first term."

"The *same exclusive right* is continued the second term *that existed the first*" (Wheaton *v.* Peters, 8 Peters, at p. 663).

The literary compositions, including the part of "The Professor at the Breakfast Table," which were published in the magazine number received copyright protection—*not under separate copyrights*—but through the *single* copyright of the magazine number as an *entire* work, and a suit for the reproduction of any part of that number must proceed for an infringement of a copyright of that number. (Bennett *vs.* Boston Traveler Co., 101 Fed. R., 445; Harper *vs.* Shoppell, 23 Blatch., 431, 432). *There was no other copyright to renew.*

What was the recorded title of the magazine number? "No. 26 Atlantic Monthly" (p. 4). *That title was not recorded the second time.* To record the title, "The Professor at the Breakfast Table," is not to record the title, "No. 26 Atlantic Monthly." As well might it be claimed that to record the title of any of the other compositions, contained in the magazine number, would be to record the title of the magazine number.

It was claimed below by appellants that the publishers had no right of renewal on Dr. Holmes' work. This may well be, but we are not dealing with a renewal of a copyright of Dr. Holmes' work.

The copyright of his work was void *ab initio*, because entered after publication (Point I.). We are dealing with a copyright of the *magazine number* protecting a part of his work *as a part of that copyrighted magazine number*. It may be, also, that the publishers had no right of renewal of the copyright of the magazine number, but that question is not presented here.

The appellants further claimed below that "Dr. Holmes had certainly no right to renew the copyright on the *Atlantic Monthly* for December, 1859." If this be so, then the appellants concede away their case because *there was no other copyright to renew*. There was no other copyright save that of "The Professor at the Breakfast Table" entered by Dr. Holmes, and that could not be renewed, because it was invalid originally (Point I., *supra*).

Whether or not Dr. Holmes could have renewed the copyright of the magazine number is a purely academic question, for he took no steps whatever to renew that copyright. If the statute did not authorize him to renew that copyright, then he lost the privilege of renewal through his own disregard of the plain and simple provisions of the act. Originally all that he had to do was to copyright his composition in his own name and before any publication thereof. Thereupon, he could publish his work serially in a magazine or in separate book form or otherwise, with notice of the copyright entered by him. When the time to renew came around, he would have had simply to deposit the title of his composition a second time and take the other prescribed steps to secure renewal. *This plain course, mapped out by the act, Dr. Holmes did not choose to follow.* He secured no copyright protection, except for a part of his work, and that under a copyright entered in the name of his publishers in a magazine number. If he could not legally renew it, then the situation is due to his own neglect to protect himself.

We contend, however, that *had nothing occurred*

during the first term to invalidate the copyright of the magazine number, Dr. Holmes could have renewed that copyright for the protection of his composition, embodied in that number. To the extent of that composition he was the "author" of that *copyrighted* magazine number and *as such*, and not as author of the *uncopyrighted* work entitled "The Professor at the Breakfast Table," he could secure a renewal of the copyright of such magazine number for the protection of his composition therein contained. The appellants were at great pains below to establish the very clear legal proposition that a person may secure copyright protection for part of a work by entering the whole for copyright, although he is not entitled to copyright the remainder of the work. *May he not, then, by exact parity of reasoning, renew the copyright of the whole and thereby continue the protection of the part?* But the steps to secure a renewal of copyright of the *magazine number* were to deposit in the proper office *its* title, to wit, "Number 26 *Atlantic Monthly*" (p. 4), and two copies of the number, a second time, and publish the record. This the author did not choose to do.

IV.

The decrees of the Courts below should be affirmed.

ANDREW GILHOOLY,
Of Counsel for Appellee.

Supreme Court of the United States.

No. 268.—October Term, 1902.

George H. Mifflin et al., Appellants, vs. The R. H. White Company. } Appeal from the United States Circuit Court of Appeals for the First Circuit.

[June 1, 1903.]

This was a bill in equity by the firm of Houghton, Mifflin & Co., as assignees of the late Oliver Wendell Holmes, against the R. H. White Company, for a violation of the copyright upon the "Professor at the Breakfast Table." The work was published serially during the year 1859, in the Atlantic Monthly Magazine, at first by Phillips, Sampson & Co., and later by the firm of Ticknor & Fields. The first ten parts were published from January to October, 1859, by Phillips, Sampson & Co. without copyright protection. The remaining two numbers for the months of November and December, 1859, were entered for copyright by Ticknor & Fields, whose copyright purported to cover the entire magazine. After its publication serially had been completed Dr. Holmes published the entire work in one volume, containing a proper notice of copyright.

Upon this state of facts the Circuit Court dismissed the bill, (107 Fed. Rep. 708,) and upon appeal to the Circuit Court of Appeals that court affirmed the decree. (112 Fed. Rep. 1004.)

Mr. Justice Brown delivered the opinion of the Court.

That the copyright taken out by the author after the serial publication of his work in the Atlantic Monthly did not prevent the republication of so much of such serial as had appeared in the magazine prior to December, 1859, and before any steps taken to obtain a copyright, was settled by this court in *Holmes* v. *Hurst*, (174 U. S. 82,) wherein we held that the appearance of a work in a magazine, by consent of the author, was such a publication as vitiated the copyright under section four of the copyright act of 1831. (4 Stat. 436.)

The question presented by this case is whether entering for copyright the last two parts of the "Professor at the Breakfast Table" in the December number of 1859 of the Atlantic Monthly by Ticknor & Fields, proprietors of the magazine, was sufficient to save the rights of the author,

the plaintiff having purchased such rights from the executor of the late Dr. Holmes.

By section one of the act of February, 1831, "the author or authors of any book or books . . . not printed and published, . . . and the executors, administrators, or *legal assigns* of such person or persons, shall have the sole right and liberty of printing," &c. By section four, "no person shall be entitled to the benefit of this act, unless he shall, *before publication*, deposit a printed copy of the title of such book . . . in the clerk's of the District Court of the district wherein the author or *proprietor* shall reside," when the clerk is directed to make a record of the same, in a form prescribed, wherein is stated the date, the name of the author or proprietor, &c.; and by section five, the person entitled to the benefit of the act shall give information of his copyright, by giving notice on the title page, or page immediately following, in a prescribed form. Construing these statutes together, it would seem that the word "proprietor," in the fourth section, must practically have the same meaning as "legal assigns" in the first section, and was designed to give to the legal assignee of any author or authors the right to take out the copyright in his own name.

There is no evidence in this case, however, that Dr. Holmes, the author of the "Professor at the Breakfast Table," ever assigned to either of the proprietors of the magazine the authority to copyright his work. While there is an allegation in the bill, upon information and belief, that the work—the first ten parts of which were published by Phillips, Sampson & Co.—was printed published and sold by said Phillips, Sampson & Co. "by and with the consent and authority of the said Oliver Wendell Holmes, and in accordance with an agreement" made with him by the said firm, whereby he granted to them the right to print, publish and sell his work in the said magazine, there is no allegation that either Phillips, Sampson & Co. or their successors, Ticknor & Fields, were authorized to enter "The Professor at the Breakfast Table" for copyright, either in their own names, or in the name of the author; nor does there appear to be any connection whatever between the copyright taken out by Ticknor & Fields and that subsequently taken out by Dr. Holmes. The entry of the Atlantic Monthly by Ticknor & Fields was evidently not intended for the protection of the author of each article therein appearing, but for their own protection, and to prevent the republication of the December number of the Atlantic Monthly. While, without further explanation, it might, perhaps, be inferred that the author of a book who places it in the hands of publishers for publication, might be presumed to intend to authorize them to obtain a copyright in their own names, (*Pulte* v. *Derby*, 5 McLean, 328; *Belford* v. *Scribner*, 144 U. S. 448, 504,) it is apparent that there was no such intention in this case, inasmuch as almost

immediately after the publication of the December number of the magazine, Dr. Holmes himself entered the book under its correct title for copyright. That right was never assigned until 1895, when it was turned over to the plaintiffs by the executor of the author. Had the copyright been entered by Ticknor & Fields, as agents of Dr. Holmes, it is possible it might have been sustained, but there is nothing to indicate that Ticknor & Fields were acting for any one else than themselves; and there is nothing to show that Dr. Holmes ever assented to their copyrighting his work. It is impossible to see how the copyright subsequently obtained by Dr. Holmes can derive any additional support from the fact that Ticknor & Fields chose to copyright the final chapters of the work in the Atlantic Montly, since there is nothing to indicate that he even knew that any such proceedings were contemplated, much less that he authorized it.

But, even assuming that it was done by his authority, there is an additional question whether the entry of a book called the "Atlantic Monthly Magazine," in the name of Ticknor & Fields, is equivalent to entering a book called "The Professor at the Breakfast Table," by Oliver Wendell Holmes. The two entries were in the following form:

1. Entry of "the Atlantic Monthly" for the month of December, 1859. "Entered according to act of Congress in the year 1859, by Ticknor & Fields, in the clerk's office of the District Court of the District of Massachusetts."

2. Entry of "The Professor at the Breakfast Table." "Entered according to act of Congress in the year 1859, by Oliver Wendell Holmes, in the clerk's office of the District Court of the District of Massachusetts."

The object of the notice being to warn the public against the republication of a certain book by a certain author or proprietor, it is difficult to see how a person reading either of these notices would understand that they were intended for the protection of the same work. On their face they would seem to be designed for an entirely different purpose. While owing to the great reputation of the work and the fame of its author, we might infer in this particular case that no publisher was actually led to believe that the book copyrighted by Dr. Holmes was not the same work which had appeared in the Atlantic Monthly, that would be an unsafe criterion to apply to a work of less celebrity. It might well be that a book not copyrighted or insufficiently copyrighted by the author might be republished by another in total ignorance of the fact that it had previously appeared serially in a copyrighted magazine. It is incorrect to say that any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained, since the right being purely statutory, the public may justly demand that the person claiming a monopoly of publication shall pursue, in substance at least, the statutory method of securing it. (*Thompson* v. *Hubbard*, 131 U. S. 123.) In

determining whether a notice of copyright is misleading we are not bound to look beyond the face of the notice, and inquire whether under the facts of the particular case, it is reasonable to suppose an intelligent person could actually have been misled.

With the utmost desire to give a construction to the statute most liberal to the author, we find it impossible to say that the entry of a book under one title by the publishers can validate the entry of another book of a different title by another person.

The decree of the Court of Appeals was correct, and it is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.